6-117

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~774.~~ ~~47~~ ~~366~~ 36

THE ÆTNA INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM C. BOON, ISAAC PEARSON, HORATIO N. BOSTWICK, AND BENJAMIN SMITH, PARTNERS AS BOON, BOSTWICK & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED JANUARY 4, 1875.

Dec 20 1877
Pearsall

SUPREME COURT OF THE UNITED STATES.

No. 774.

THE ÆTNA INSURANCE COMPANY, PLAINTIFF IN ERROR

vs.

WILLIAM C. BOON, ISAAC PEARSON, HORATIO N. BOSTWICK, AND BENJAMIN SMITH, PARTNERS AS BOON, BOSTWICK & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

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1 *Petition for writ of error.*

Circuit court of the United States, district of Connecticut.

WILLIAM C. BOON ET AL.
vs.
ÆTNA INSURANCE CO.

To the honorable the judges of the circuit court of the United States for the second circuit and district of Connecticut:

The petition of the said Ætna Insurance Company, defendant in the above-entitled action, respectfully represents that it is aggrieved by the final judgment rendered against it in the said action upon the docket of this court, and is informed there is error therein to its prejudice, and it is desirous that a writ of error be allowed it therefrom to the Supreme Court of the United States.

Wherefore it prays that a writ of error be allowed it, returnable to the next term of the Supreme Court of the United States, and that the same may operate as a supersideas.

ÆTNA INSURANCE COMPANY,
By WM. HAMERSLEY, *of Counsel.*

2 Circuit court of the United States, district of Connecticut.

WILLIAM C. BOON ET AL.
vs.
ÆTNA INSURANCE COMPANY.

On motion of William Hamersley, esq., of counsel for the above-named defendant, and on filing the petition of said defendant representing that it is aggrieved by the judgement rendered against it herein and praying a writ of error therefrom to the Supreme Court of the United States, ordered that a writ of error be allowed and that the same operate as a supersidias upon the defendant giving bond conditional according to law in the penal sum of eighteen thousand dollars, with Lucius J. Hendee and Austin Dunham, of Hartford, as security thereon, pursuant to the permission to give the security required by law for that purpose granted by the honorable Ward Hunt, an associate justice of the Supreme Court of the United States, in an order passed September 24th, A. D. 1874, and filed October 7th, A. D. 1874.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court, at Hartford, this 7th day of October, A. D. 1874.

N. SHIPMAN, [L. S.]
One of the Judges of the Circuit Court.

3 Circuit court of the United States, district of Connecticut.

WILLIAM C. BOON ET AL.
vs.
ÆTNA INSURANCE COMPANY.

Know all men by these presents that we, the Ætna Insurance Company, a corporation under the laws of the State of Connecticut, and located in Hartford in said State, as principal, and Lucien J. Hendee and Austin Dunham of said Hartford as surety, are held and firmly bound unto Wm. C. Boon, of Keokuk, in the State of Iowa, Horatio N. Bostwick,

of said Keokuk, Isaac Pearson, of Fayette, in the State of Missouri, and Benjamin Smith, of Springfield, in the State of Illinois, in the full and just sum of eighteen thousand dollars, to the said William C. Boon, Horatio N. Bostwick, Isaac Pearson, and Benjamin Smith, or their assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally by these presents.

Whereas, lately, at a circuit court of the United States, second judicial circuit, holding sessions in and for the district of Connecticut,
4 in a suit depending in said circuit court, wherein William C. Boon, Horatio N. Bostwick, Isaac Pearson, and Benjamin Smith are plaintiffs, and said Ætna Insurance Company is defendant, judgement was rendered against the said Ætna Insurance Company defendant, and the said Ætna Insurance Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation addressed to the said William C. Boon, Horatio N. Bostwick, Isaac Pearson, and Benjamin Smith, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday in October next:

Now the condition of the above obligation is such that if the said Ætna Insurance Company shall prosecute its said writ to effect, and answer such judgment and all damages for delay and costs and interest on said appeal, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

In witness whereof the said Ætna Insurance Company has
5 caused its corporate seal to be hereto affixed; and Lucien J. Hendee, president of said corporation, (he being duly authorized thereto by vote of the board of directors thereof,) has subscribed its corporate name, and the said Lucien J. Hendee and Austin Dunham have set their hands and seals hereto, this seventh day of October, A. D. 1874.

ÆTNA INSURANCE CO.,
B' L. J. HENDEE, *Prest.* [SEAL.]
LUCIUS J. HENDEE. [L. S.]
AUSTIN DUNHAM. [L. S.]

Witness:
CHAS. E. PONDEXTER.

6 UNITED STATES OF AMERICA:

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States in and for the second circuit, and holding sessions for the district of Connecticut, within said circuit, greeting:

Because in the record and proceedings, as also in the rendering of the judgment of a plea which is in the said circuit court before you, or one of you, between William C. Boon and Horatio N. Bostwick, of Keokuk, in the State of Iowa; Isaac Pearson, of Fayette, in the State of Missouri; and Benjamin Smith, of Springfield, in the State of Illinois, partners in business, by the name of Boon, Bostwick and Company, plaintiffs, and the Ætna Insurance Company, a corporation
7 under the laws of the State of Connecticut, located and having a place of business in the town and county of Hartford, in said district, defendant, a manifest error hath happened, to the great damage of the said Ætna Insurance Company, as by this complaint appears;

and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, A. D. 1874, in the said Supreme Court to be then and there
8 held, that, the record and proceedings aforesaid being inspected, the said Supreme court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 7th day of October, the year of our Lord one thousand eight hundred and seventy-four.

LOREN P. WALDO,
Clerk of the United State: Circuit Court
for the District of Connecticut.

9 UNITED STATES OF AMERICA,
District of Connecticut:

The President of the United States to William C. Boon, of Keokuk, in the State of Iowa, Isaac Pearson, of Fayette, in the State of Missouri, Horatio N. Bostwick, of said Keokuk, and Benjamin Smith, of Springfield, in the State of Illinois, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, A. D. 1874, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the second circuit and district of Connecticut, wherein you are defendants in error and the Etna Insurance Company, a corporation under the laws
10 of the State of Connecticut, located and having a place of business in the town and *and* county of Hartford, in said district, is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 7th day of October, in the year of our Lord one thousand eight hundred and seventy-four.

N. SHIPMAN,
One of the Judges of the Circuit Court of the U. S.
for the District of Connecticut.

Due and legal service of the above citation is hereby accepted,
11 and we agree and request that the said writ shall be returned and docketed at any time during the October term, 1874, of the United States Supreme Court.

WM. C. BOON,
ISAAC PEARSON,
HORATIO N. BOSTWICK,
BENJAMIN SMITH,
By FRANCIS FELLOWES, *Attorney.*

The answer of Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, to the foregoing writ:

The record, proceedings, and judgment whereof mention is therein made follow in these words, viz:

12 WM. C. BOON & OTHERS } Contract void
vs.
ÆTNA INSURANCE COMPANY. }

Be it remembered that on the 7th day of September, A. D. 1865, the Ætna Insurance Company, a corporation duly constituted by the laws of the State of Connecticut, and located and having its place of business at Hartford, in said State and district of Connecticut, and a citizen of said State of Connecticut, was summoned to appear before the hon. circuit court of the United States for the district of Connecticut, to be holden at Hartford within and for said district of Connecticut, on the third Tuesday of September A. D. 1865, then and there to answer unto William C. Boon, of Keokuk, in the State of Iowa, and a citizen of said State of Iowa, Isaac Pearson, of Fayette, in the State of Missouri, and a citizen of said of Missouri, Horatio N. Bostwick, of Keokuk, in the State of Iowa, and a citizen of said State of Iowa, and Benjamin Smith of Springfield, in the State of Illinois, and a cit-
13 izen of said State of Illinois, partners in business under the name of Boon, Bostwick & Co., in a plea of the case, whereupon the plaintiffs declare and say, that, heretofore, to wit, on the second day of September A. D. 1864, the defendants executed and delivered to the plaintiffs a certain instrument in writing, commonly called a policy of insurance, with the acts of to which were affixed two United States internal-revenue stamps of the denomination of twenty-five cents each, duly cancelled, all in accordance with the acts of Congress in such case provided, of the form and tenor following, to wit:

No. 160.] [$6,000.

ÆTNA INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

By this policy of insurance the Ætna Insurance Company, in consideration of sixty $\frac{}{100}$ dollars, to them paid by the assured, hereinafter named, the receipt whereof is hereby acknowledged, do insure Boon, Bostwick & Co., of Howard County, against loss & damage by fire, to the amount of six thousand dollars for the term of one year from the 2d day of September, 1864, at 12 o'clock noon, to the 2d day of September, 1865, at noon, on merchandize contained in a two-story brick store-house, situated on corner of 1st & Market street, block No. 11, lot No. 15, Glasgow,
14 Howard County, Missouri, (notice of other insurance waived,) from the 2d day of September, 1864, to 2d day September, 1865.

$6,000.] C. 1. [$60

And the said company do hereby promise and agree to make good unto the said assured, their executors, administrators, and assigns all such immediate loss or damage not exceeding in amount the sum insured, as shall happen by fire to the property, as above specified, from the 2d day of September, one thousand eight hundred and sixty-four, (at 12 o'clock at noon,) unto the 2 day of September, one thousand eight hundred and sixty-five, (at 12 o'clock at noon,) the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within

sixty days after notice and proof thereof made by the assured in conformity to the conditions annexed to this policy; provided always, and it is hereby declared, that this company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion,
15 or of any military or usurped power, or any loss by theft at or after a fire. And provided further, that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, and not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect. And if the said assured or their assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect; and in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property. And it is agreed and declared to be the true intent and meaning of the parties hereto that in case the above-mentioned property shall at any time after the making and during the continuance of this insurance be appropriated, applied, or used to or
16 for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous, extra-hazardous, or included in the memorandum of special notes, in the conditions annexed to this policy, or for the purpose of storing or vending therein any of the articles, goods, or merchandize, in the conditions aforesaid, denominated hazardous, extra-hazardous, or included in the memorandum of special notes, unless herein otherwise specially provided for, or hereafter agreed by this company in writing, and added to or endorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease and be of no force or effect.

And it is moreover declared that this insurance is not intended to apply to or cover any books of accounts, written securities, dues, or other evidences of title to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion; and that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for.

17 This policy shall not be valid until countersigned by the duly-authorized agent of said Ætna Insurance Company, at Glasgow, Mo.

In witness whereof the Ætna Insurance Co. have caused these presents to be acknowledged by the names of their president and secretary, of the city of Hartford, and State of Connecticut.

THO. A. ALEXANDER,
President.

L. J. HENDEE,
Secretary.

Countersigned at Glasgow this 2d day of September, A. D., 1864.

JAS. S. THOMPSON,
Agent.

Conditions of insurance referred to in the body of the foregoing policy.

1. Goods not hazardous are such as are usually kept in dry-goods stores, including coffee, flour, household furniture, and linen, indigo, rice, spices, sugars, teas, and other articles not combustible.

2. The following trades and occupations, goods, wares, and merchandize are denominated hazardous, viz: Alcohol, basket-sellers, brush-makers' stock, cabinet-furniture, china, earthen or glass ware, or
18 plate-glass in boxes, crates. or casks, copper-plate printers, cotton in bales, hat-finishers, (without use of fire except for heating their irons) hardware and cutlery, jewelers' stock, liquor in glass unpacked; looking-glasses in boxes, Manilla grass in bales, paints ground in oil, paper-hanging', porter-houses, potash, pocket-book-makers' stock, printers of newspapers, rags in packages, sail-makers, ship-chandlers, spirituous liquors, cigar-makers, stationers' stock, snuff-makers, thrashed grain, tin or sheet iron workers, victualling-houses, watch-makers' stock and tools, wine in glass in packages, window or plate glass in packages.

3. The following trades and occupations, goods, wares, and merchandise are denominated extra-hazardous, viz: Basket-makers, straw-bleachers, book-sellers' stocks, blacksmiths, boat-builders, brass-founders; china, earthen-ware, or glass-ware or looking-glasses, unpacked; confectioners' stock; cotton, unpacked; coopers, coppersmiths, druggists, and apothecaries; fur-sewers, flax, in bales, fringe-makers, gun makers or smiths, grate-makers, hay, pressed, in bundles; hemp, in bales, ink-makers, lamp-manufacturers, lamp-sellers' stock, lithographers, milliners stock, morrice manufacturers; optical and mathematical instruments makers, printers stock, perfumers' stock,
19 phosphorous; pictures and prints; printers of books, and jobbing plate or plated-ware manufacturers, pocket-book makers, plumbers and pla'terers, salt-petre, silversmiths, stables, (private;) spirits of turpentine, stove manufactories, tobacco manufacturers, toy-keepers' stock, type or ster'otype manufacturers, varnish. window and plate glass, unpacked.

Mem.—Bakers, bark-mills, blind-makers, breweries, book-binders, blacksmiths, boat-builders, cabinet-makers, carpenters, joiners, chair or coach-makers, cook-shop, chemists, cotton-mills, dyers, forges, fences, frame-makers, furriers, pulling-mills, grist-mills, hat manufactories, houses building or repairing, ink, or ivory-black, or lamp-black manufactories; livery-stables, lumber or mahogany yards, malt-houses, metal and other mills of all kinds, musical-instrument makers, oil-makers, pump and block makers' shops, paper-mills, rope-makers, saw-mills, *mills*, ship-builders' stock in the yards, ships' and other vessels' import, or their cargoes, or when building or repairing; steam-engines or boats, tanneries, tallow-melters and chandlers, timber-yards, woolen-mills, and, generally, all manufacturing establishments, and all trades requiring the use of fire, heat, or steam-power, not before enumerated, will be insured at special rates of premium.

20 The following are not to be insured at any rate of premium, viz: Brimstone-works, distilleries, flax-mills, gunpowder, oil-boiling houses, oakum-factories, panoramas or other scenic paintings, patent-leather manufactories, sash and blind factories, snuff-mills, steam planing-mills, tar-boiling houses, theatres, turpentine manufactories, varnish-makers, steam saw-mills, sugar-refineries, and India-rubber factories.

4. Application for insurance must specify the construction and materials of the buildings to be insured, or containing the property to be

insured, by whom occupied, whether as a private dwelling or how otherwise; its situation with respect to contiguous buildings, and their construction and materials, whether any manufactory is carried on within or about it, and, in case of goods and merchandize, whether or not they are of the description denominated hazardous, extra-hazardous, or included in the memorandum of special rates; and a false description by the assured of a building or of its contents, or the omission to make known any fact material to the risk, or in a valued policy an overvaluation, shall render absolutely void a policy issued upon such description or valuation. But the office will be responsible for the ac-
21 curacy of surveys and valuations made by its agents. If after insurance is effected, either by the original policy or by the renewal thereof, the risk be increased by any means within the control of the assured, or if such building or premises shall be, with the assent of the assured, occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect. If during this insurance any subsequent insurance should be made upon the property hereby insured, which, with the sum or sums already insured, should, in the opinion of the said Ætna Insurance Company, amount to an over-insurance, or the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise, or if for any other cause the company shall so elect, it shall be optional with the company to cancel this policy after notice given to the assured, or his representative of their intention to do so, in which case the company will refund the premium for the unexpired time.

5. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

22 6. Goods held in trust or on commis'ion are to be insured as such; otherwise the policy will not cover such property; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured. If the interest or property insured be lease-hold, or that of mortgage or any other interest not absolute, such must be made known to this company and expressed in the policy.

7. Policies of insurance subscribed by this company shall not be assignable without the consent of the company, expressed by endorsement made thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company in virtue of such policy shall thenceforth cease.

And in case of any transfer or exchange of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease.

8. This company will not be liable for damage to property by lightning, aside from fire, nor for damage occasioned by the explosion of a steam-boiler, nor for damage by fire resulting from such explo-
23 sion, nor explosions caused by gunpowder, gas, or other explosive substances, nor for damage occasioned by the use of camphene or burning-fluid, coal-oil, petroleum, or any of their products, by whatever name designated, unless otherwise expressly provided. The keeping of gunpowder for sale or on storage, upon or in the premises insured, without written permission in the policy, shall render it void.

9. Jewels, watches, plate, medals, musical instruments, paintings, statuary, sculpture, and curiosities, are not deemed to be included in any insurance, unless an inventory thereof accompany the application for insurance, or is inserted in the policy.

10. In case of fire, or loss or damage thereby, or if exposure to loss or damage thereby, it shall be the duty of the insured to use all possible diligence in saving and preserving the property; and if they shall fail so to do, this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect; and it is also mutually understood that there can be no abandonment to the insurers of the subject insured.

11. All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company,
24 or its agents, and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation. They shall also declare, on oath, whether any, and what, other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandize, or otherwise) the building insured, or containing the subject insured, and the several parts thereof were occupied at the time of the loss, and who were the occupants of such buildings; and when and how the fire originated, so far as they know or believe; and procure a certificate, under the hand of a magistrate or notary public, (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise or related to the insured or sufferers,) that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent inquiry into the facts set forth in their statement, and knows, or verily believes, that he, she, or they really, and by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss and damage to the amount
25 therein mentioned, and also, if required, shall produce their books of account and other proper vouchers, and shall also, if required, submit to an examination, under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing; and until such proof, declarations, and certificates are produced, and examination, if required, the loss shall not be deemed payable. Also, if there appear any fraud or false swearing, the insured shall forfeit all claim under this policy. Damage to buildings not totally destroyed shall be appraised by disinterested men, mutually agreed upon by the assured and the office, or its agents; and where merchandize or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kind, and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of said damage
26 on each article, by disinterested appraisers, mutually agreed upon, whose detailed report in writing shall form a part of the proof required to be furnished by the claimant, one-half of the appraiser's fees to be paid by the insurers. A copy of the written portion of the policy to be given in the affidavit of the claimant in all cases; also copy of all other policies insuring same property, and having payment of the same loss with this company. A claim for loss or damage on a policy assigned, where there is no actual sale or transfer of the property insured, proofs of loss shall be made by the assured in conformity with the conditions of this policy, in like manner as if no assignment had been made; otherwise this policy shall be void and of no force or validity whatever, and

all liability on the part of this company shall cease. Re-insurance for any other insurance company to be on the basis of joint liability with said company, and in no event will this company be liable for a sum greater than such portion as the sum hereby re-insured bears to the whole sum insured or the property by the company re-insured, and
27 in case of loss, this company to pay their pro rata proportion at the same time, manner, and form as the company re-insured. Plans and specifications of buildings, machinery, and fixtures damaged or destroyed, must be furnished free of expense, when requested. When an inventory of merchandize or other property, sound or damaged, is to be taken in adjusting a claim for loss or damage, this company shall have notice, and the appointment of one or more assistants to complete such listing of property, when required by its agent.

12. Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, and in case differences shall arise touching any loss or damage, it may be submitted to the judgment of arbitrators indifferently chosen, whose award in writing shall be binding on the parties. In case of any loss on or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention to do so within thirty days after the preliminary proofs shall have been received at the office of the company.

28 13. Insurance once made may be continued for such further periods as may be agreed on, the premium thereon being paid and a renewal receipt being given for the same, and it shall be considered continued under the original representation, terms, specifications, and conditions, in so far as not plainly varied in writing. When the risk has been changed, either within itself or by the surrounding or adjacent premises, it shall be incumbent on the party insured to give notice thereof, and have the same described and asserted to in writing.

14. When a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured.

15. Where property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured an' the insurers in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

16. The company will not be answerable for any loss arising from the use of fires, in buildings unprovided with a good and substan-
29 tial stone or brick chimney, or in consequence of neglect or deviation from the laws or regulations of police made to prevent accidents from fires in places where laws and regulations on this subject exist.

17. It is furthermore hereby expressly provided that no suit or action against said company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur, and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive

evidence against the validity of the claim thereby so attempted to be enforced.

18. In case this insurance shall be on property situated over one mile from the city, town, or village in which the agency is located where this policy is filled and countersigned, it is to be a condition of the insurance in the event of any loss covered by this policy, one-fourth of such loss is to be borne by the assured, and three-fourths by this company, (not exceeding the sum insured,) nor, in the event of additional in-
30 surance by other companies on property so situated, any greater proportion of said loss than may be necessary to make good said three-fourths proportion of the loss sustained, except in the case of buildings damaged or partially destroyed, which have been surveyed and values approved by a duly-authorized agent or surveyor of this company.

And the plffs. say that, in consideration that the plaintiffs, on said 2nd day of September, A. D. 1864, assumed and faithfully promised the defendants that they would perform all the stipulations and agreements in said instrument or policy of insurance, on their part to be performed, and in consideration that the plaintiffs had paid to the defendants the sum of sixty ($60) dollars, being the premium of insurance in said instrument or policy of insurance specified, they, the defendants, assumed and faithfully promised the plaintiffs to perform all the stipulations and agreements in said instrument or policy of insurance, on their part to be performed.

And the plaintiffs say that they at the time of the making of said instrument or policy of insurance, and from thence until the loss and damage hereinafter mentioned, were interested in the said insured prem-
ises, in the said policy of insurance mentioned, and thereby in-
31 tended to be insured, as absolute owners thereof, to the whole amount of insurance in said policy of insurance mentioned, to wit, to the amount of six thousand ($6,000) dollars.

And the plaintiffs further say that, after the making of the said policy of insurance, and while the same was and remained in full force, to wit, on the 15th day of October, 1864, the said insured property in the said policy of insurance mentioned was accidentally and by misfortune burnt up, consumed, and destroyed by fire.

And the plaintiffs further say that they forthwith, thereafter, to wit, on the day of , gave notice to the defendants of said loss, and as soon as possible delivered to the defendants a particular account of the loss by them sustained by the destruction of said insured property as aforesaid, signed with their own hand, and verified by their oath in due form, administered by R. B. Foote, a notary public in and for the county of Lee, and State of Iowa, and on the same day the plaintiffs made a declaration on oath, duly administered by said R. B. Foote, notary public as aforesaid, that said insured property so destroyed as aforesaid was otherwise insured as follows, to wit, for the sum of three thousand ($3,000) dollars in the Howard County Mutual Insur-
32 ance Company, Fayette, Missouri, and for seven thousand ($7,000) dollars on the Home Insurance Company, New York; that the whole value of said insured property was not less than forty-five thousand (45,000) dollars; that the interest of the plaintiffs in said insured property was that of absolute and exclusive owners thereof; that the building containing said insured property, and the several parts thereof, were occupied at the time of said loss for the business of the sale of general merchandize; that the plaintiffs were the sole occupants of said

building, and that said fire originated, so far as they knew and believed, as follows:

"The town (meaning said town of Glasgow, Missouri,) was garrisoned by a small force of U. S. troops and citizen militia, under command of Col. Chester Harding, and on the 15th day of October, 1864, was attacked by a large rebel force and compelled to surrender.

Previous to the surrender, the Government stores contained in the city hall *and* set on fire for the purpose of saving them from falling into the hands of the enemy, and to the best of their, the plaintiff's knowledge and belief, the destruction of said property of the plaintiffs was the accidental result of the burning of the city hall, and that the
33 burning of the Government stores was done by order of Col. Chester Harding and Major Moore, U. S. quartermaster, in order to keep them from the hands of the enemy, and with no intent or expectation of destroying any private property.

Which said declaration, sworn to as aforesaid, was by the plaintiffs afterward, to wit, on said day of , together with a copy of the written portion of said policy of insurance, and also together with copies of all other policies insuring the same property and sharing payment of the same loss with the defendants, to wit, said policies issued by said Howard County Mutual Insurance and said Home Insurance Company, delivered to the defendants.

And the plaintiffs further say that, afterwards, to wit, on the 2d day of May, 1865, they procured a certificate under the hand of H. R. Cockwell, a notary public, most contiguous to the place of said fire and not concerned in the loss as a creditor, or otherwise, or related to the plaintiffs; that he was acquainted with the character and circumstances of the plaintiffs; had made diligent inquiry into the facts set forth in their said statement, and verily believed that they really and by misfortune, and without fraud or evil practice, had sustained, by such fire, loss and damage to the amount therein mentioned.

34 And the plaintiffs further say that they have always been, and are now, ready and willing, if required by the defendants, to produce their books of account and other proper vouchers, and to submit to an examination under oath, by the agent or attorney of the company, and answer all questions touching their knowledge of anything relating to said loss or damage, or to their claim thereupon, and to subscribe such examination, the same having been reduced to writing.

And the plaintiffs say that they have, in all things, conformed themselves to and performed and observed, all and singular, the articles, stipulations, matters, and things in said policy of insurance contained, which on their part were to be performed and observed, according to the tenor and effect and true intent and meaning of said instrument or policy of insurance.

Whereby, and by reason of the premises, the defendants became liable to pay to the plaintiffs said sum of six thousand dollars, in sixty days after notice and proof of said loss, made by the plaintiffs as aforesaid, or to replace the property, so lost as aforesaid, with other property of the same kind and equal goodness, within a reasonable time.

35 Yet the plaintiffs say that, although sixty days have long since elapsed since notice of said loss was given to the defendants, and proof thereof made by the plaintiffs, in conformity to the conditions annexed to said policy of insurance, the defendants, though often requested, have not paid to the plaintiffs said sum of six thousand dollars, nor any part thereof, nor, though a reasonable time has long since elapsed, have the defendants replaced the property, burnt by fire

as aforesaid, with other property of the same kind and equal goodness, or with any property whatsoever, contrary to the tenor and effect, true intent and meaning of the said instrument or policy of insurance, and of the promises of the defendants in that behalf, so made as aforesaid. And so the plaintiffs, in fact, say that the defendants, although often requested so to do, have not kept their said promises, so by them made as aforesaid, but have broken the same, and to keep the same with the plaintiffs have hitherto wholly neglected and refused and still do neglect and refuse.

And also in a further plea, whereupon the plaintiffs declare and say that heretofore, to wit, on the 2nd day of September, A. D. 1864,
36 they were interested in certain other merchandize contained in a two-story brick store-house, situated on the corner of 1st and Market street', block No. 11, lot No. 15, in the town of Glasgow, Howard County, State of Missouri, to the value of forty-five dollars, and so continued interested until the destruction of said merchandize by fire, as hereinafter mentioned; and the said defendants, on the same day, in consideration of a premium in money then and there paid to them therefor, by the plaintiffs, made a certain other policy of insurance upon said merchandize, which said policy was duly and properly stamped according to the laws of the United States, and thereby promised the plaintiffs to insure six thousand dollars thereon, from said 2d day of September, 1864, at 12 o'clock noon, unag he 2d day of September, 1865, at noon, against all such loss or damege as should happen to said merchandize by fire, other than fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, to the amount aforesaid, to be paid to the plaintiffs in sixty days after notice and proof of the same, upon condition that the plaintiffs, in case of such loss, should forthwith give notice thereof to the defendants, and as soon thereafter as possible should de-
37 liver in a particular account thereof, signed with their own hands and verified by their oath or affirmation; and, if required, should produce their books of account, and other proper vouchers, and also, if required, should submit to an examination, under oath, by the agent or attorney of the defendants, and answer all questions touching their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing; and should declare, on oath, whether any and what other insurance has been made on the said property; what was the whole value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandize, or otherwise) the building containing the subject insured, and the several parts thereof, were occupied at the time of said loss, and who were the occupants of such buildings, and when and how the fire originated, so far as they knew or believed; and should procure a certificate, under the hand of a magistrate or notary public, (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or re-
38 lated to the plaintiffs,) that he was, at the time of certifying, acquainted with the character and circumstances of the plaintiffs; that he had made diligent inquiry into the facts set forth in their statement, and knew, or verily believed, that they really and by misfortune, and without fraud or evil practice, had sustained, by such fire, loss and damage to the amount therein mentioned.

And the plaintiffs aver that afterwards, and before the expiration of the time limited in said policy, to wit, on the 15th day of October, 1864, the said merchandise was accidentally and by misfortune totally con-

sumed by fire, of which loss the plaintiffs forthwith gave notice to the defendants, and as soon as possible there after, to wit, on the 25th day of April, A. D. 1865, delivered to them a particular account thereof, signed with their hands and verified by their oath, and did at the same time declare, on their oath, whether any and what other insurance had been made on the same property, what was the whole value of the subject named; what was their interest therein; in what general manner (as to trade, manufactory, merchandize or otherwise) the building containing the subject insured, and the several parts thereof, were
39 occupied at the time of the loss, and who were the occupants of such buildings, and when and how the fire originated so far as they knew or believed; and afterwards, to wit, on the 2d day of May, 1865, did procure a certificate under the hand of H. Clay Cockerill, a notary public most contiguous to the place of said fire, and not concerned in the loss as a creditor or otherwise, nor related to the plaintiffs, that he was then acquainted with the character and circumstances of the plaintiffs, had made diligent inquiry into the facts set forth in their said statement, and verily believed that they really and by misfortune and without fraud or evil practice, had sustained, by said fire, loss and damage to the amount therein mentioned, and on the same day the plaintiffs produced and delivered said certificate to the defendants.

And the plaintiffs aver that they have always been and are now ready and willing if required to produce their books of account and other proper vouchers, and to submit to an examination under oath by the agent or attorney of the defendants, and to answer all questions touching their knowledge of anything relating to said loss and damage
40 and their claim thereupon, and to subscribe such examination, the same being reduced to writing.

Yet though requested, and though sixty days after such notice and proof of said loss have elapsed, the defendants, their said promise not regarding, have not paid said sum of six thousand dollars or any part thereof to the plaintiffs, but have always neglected and refused so to do, to the damage of the plaintiffs the sum of ten thousand dollars, and thereupon they bring suit.

And at the term of the court to which said suit was brought, the said parties Boon, Bostwick & Co., plaintiffs, by Francis Fellowes, their attorney, and the Ætna Insurance Company, defendants, by E. A. Bulkeley, its attorney, duly appeared, and thereafter, to wit, on the 16th day of September, A. D. 1868, the defendants filed their plea in court in the words and figures following, viz:

41 U. S. circuit court, district of Connecticut, Sept. term, A. D. 1868.

BOON, BOSTWICK, ET AL., *vs.* ÆTNA INS. CO. } Action of assumpsit.

And the said defendants by E. A. Bulkeley, their attorney, come and defend the wrong and injury, when, &c., and say that they did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against them; and of this they put themselves upon the country.

ÆTNA INSURANCE CO.,
E. A. BULKELEY, *Atty.*

And thereafter on the 20th day of September, A. D. 1871, the defendants filed in court their notice of defence under the general issue in the words and figures following, viz:

42 U. S. circuit court, district of Conn.

BOON, BOSTWICK & CO., }
vs.
THE ÆTNA FIRE INS. CO. }

The plaintiffs will take notice that the defendants on the trial of the above-entitled cause will offer evidence to prove under the p*lan* of the general issue by them pleaded in said cause:

That the buildings and property destroyed by fire as alleged in the plaintiffs' declaration, and for the loss of which they seek to recover in said action, were destroyed by a fire which happened and took place by means of an invasion, insurrection, riot or civil commotion, or of a military or usurped power, within the meaning of the proviso in the policy of insurance upon which the plaintiffs declare, which provides that the company should not be liable for any loss which should happen in the manner aforesaid.

That prior to the time of the fire which destroyed the plaintiffs' property as alleged in the plaintiffs' declaration, a number of the States of the United States had seceded or attempted to secede from the Government; had rebelled against the Government of the United States,
43 and had organized or established a government known as the Confederate States of America. That they had organized a military force for the purpose of carrying on said rebellion, and to overthrow the Government of the United States and establish a government of their own in such portions of the United States as they could conquer and hold.

That at the time of said fire, viz, on the 15th day of October, A. D. 1864, said States were in a condition of insurrection and rebellion as aforesaid, were carrying on military operations against the Government of the United States, and had usurped a portion of its power within or adjacent to the town where the property of the plaintiffs for which they seek to recover in this action was located.

That the military forces of said States were commonly known as the confederate or rebel forces or troops.

That on said 15th day of October, A. D. 1864, and for a long time prior thereto, the town of Glasgow, where the plaintiffs' said property was located at the time of the loss by fire, had been occupied by the forces of the United States as a military post and large quantities of
44 provisions and munitions of war had been stored there.

That on or about said 15th day of October, A. D. 1864, a body of said rebel forces or troops surrounded said town of Glasgow on the left bank and attacked the forces of the United States there stationed.

That after the action had been carried on for two or three hours it became evident to the commander of the United States forces that there was no hope of a successful defence against them, and in order to prevent the stores which were in the commissary department and which were placed in the city-hall in said town of Glasgow from falling into the hands of the enemy, that is, the rebel forces or troops then and there carrying on a rebellion, insurrection, or invasion, and endeavoring to sustain a military and usurped power, he, the said commander of the United States forces, ordered the destruction of said stores as a military

necessity. In pursuance of that order said stores were set on fire, there being no other available manner for executing the order.

That the fire set as aforesaid by a military power destroyed the
45 city-hall in which said stores were situated, and spread therefrom and destroyed many other buildings and much property. That the buildings and property of the plaintiffs, for the loss of which they seek to recover in this action, was situated within a short distance of said city-hall, and were destroyed, if at all, by said fire set in the manner, at the time, and for the purpose aforesaid.

E. A. BULKELEY,
Atty. for Deft.

Whereupon, and on the same day, the plaintiffs closed the issue by filing their similiter in the following words, viz:

And as to the plea above pleaded, whereof the defendants have put themselves upon the country, the plaintiffs, do the like.

THE PLAINTIFFS,
By FRANCIS FELLOWES, *Attorney.*

And thereupon the process aforesaid was continued between the said parties upon the plea aforesaid in this same court before the judges thereof, and the issue above joined came on to be tried at the term of this court held at Hartford, within and for said district, on the third Tues-
46 day in September, 1873, on the 24th day of said September, and said parties by their attornies filed a stipulation in writing with the clerk of this court waiving a trial by jury, and thereupon said court proceeded to try and determine the issues of fact in said case, and said parties were fully heard, with their evidence and arguments of counsel, and said cause was continued to the term of this court held at New Haven, within and for said district, on the fourth Tuesday, being the 28th day of April, A. D. 1874, when, upon due consideration, this court found the issue for the plaintiffs, and thereupon it was considered that the said plaintiffs recover of the defendants the sum of nine thousand one hundred seventy-seven dollars and fifty cents damages, and their costs taxed and allowed to be seventy-three dollars and twenty-six cents, amounting in the whole to the sum of nine thousand two hundred and fifty dollars and twenty-six cents, and that execution issue therefor.

And upon the rendering of said judgment the opinion of the court was filed in said matter in the words and figures following, viz:

47 Circuit court of the United States for the district of Connecticut

WILLIAM C. BOON ET AL.
vs.
THE ÆTNA INSURANCE COMPANY.

Before Woodruff, circuit judge, & Shipman, district judge; trial by the court, a jury having been waived.

Francis Fellowes for the plaintiffs.
Geo. W. Parsons for the defendant.

WOODRUFF, *Circuit Judge:*

The facts in this case are not doubtful nor in dispute. The action is brought to recover from the defendants the amount of an insurance

against loss by fire, upon the goods of the plaintiffs, in their store, in Glasgow, Missouri, in the sum of six thousand dollars. It is founded on a policy executed by the defendant, dated September 2d, 1864, and the goods were destroyed by fire on the 15th day of October, 1864,
48 within the time of the insurance. The loss was sufficiently great to entitle the plaintiffs *of* recover, if the defendant is liable at all, the whole sum insured. The plaintiffs have complied with all the terms and conditions of the policy by the payment of premium, furnishing proper preliminary proofs of loss, and compliance with all other requirements. The policy, however, contained the following express proviso annexed to the agreement of insurance, and in the body of the policy, namely:

"Provided always, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire."

The defence herein rests solely on this proviso and the facts which are claimed to bring the plaintiff's loss within its operation, so as to exempt the defendant from liability under the policy.

At and before the time of the fire in question, the city of Glasgow, within which the said store of the plaintiffs was situated, was occupied as a military post by the military forces and portion of the Army
49 of the United States engaged in the civil war then, and for more than three years theretofore, prevailing between the Government and the citizens of several Southern States who were in rebellion and seeking to establish an independent government under the name of the Confederate States of America.

As such military post, the said city of Glasgow was made the place of deposit of military stores for the use of the Army of the United States, which stores were in a building called the city-hall, of the said city of Glasgow, situated on the same street, on the same side of the street, and about one hundred and fifty feet distant from the plaintiffs' store, three buildings being located in the intervening space, not, however, in actual contact with either. Colonel Chester Harding, an officer of the United States Government, and in command of the military forces of the United States, held the possession of the said city and had lawful charge and control of the military stores aforesaid.

On the said fifteenth day of October, 1864, an armed force of rebels under military organization surrounded and attacked the city at an early hour in the morning, and threw shot and shell into the
50 town, penetrating some buildings & killing soldiers and citizens. The city was defended by Colonel Harding and the military forces under his command, and battle between the loyal troops and the rebel forces continued many hours. The citizens fled to places of security, and no civil government prevailed in the city. The rebel forces were superior in numbers, and, after a battle of several hours, drove the forces of the Government from their position, compelled their surrender, and entered and occupied the said city.

During the battle, and when the Government troops had been driven from their exterior lines of defence, it became apparent to Colonel Harding that the city could not be successfully defended, and he thereupon, in order to prevent the said military stores from falling into the possession of the rebels, ordered Major Moore, one of the officers under his command, to destroy them. In obedience to that order to destroy the said stores, and having no other means of doing so, Major Moore set fire to the city-hall, and thereby the said building, with its contents, was

consumed. Without other interference, agency, or instrumentality, the fire spread along the line of the street aforesaid to the building next adjacent to the city-hall, and from building to building through two
51 other intermediate buildings to the store of the plaintiffs, and destroyed the same, together with its contents, including the goods insured by the defendant's policy aforesaid.

During this time, and until after the fire had consumed such goods, the battle continued, and no surrender had taken place, nor had the forces of the rebels, or any part thereof, obtained the possession of or entered the city.

Upon these facts, and in view of the before-mentioned proviso in the policy of insurance, the question arises, Is the defendant liable for the loss of the plaintiffs' goods, or does that proviso exempt the defendant from liability?

That question depends upon the answer to be given to some other questions, that is to say:

1. It is insisted that, within the just and proper meaning of the proviso, the fire in question happened by means of the unlawful and rebellious attack upon the city by forces acting in assumption of usurped power, endeavoring to capture the forces of the United States, obtain possession of territory in the lawful possession and power of the United States, in aid of the usurped rebel government, and to forcibly accomplish its objects and designs; that the fire, and therefore the destruction of the goods, were a military necessity, created by such attack
52 by an illegal force; and so they happened by means of the rebellion and the employment of organized forces to effect the objects thereof, and the actual attempt of such forces to overcome the authority and Government of the United States; that this was therefore the direct or proximate cause of the loss, or, in the words of the proviso in the policy, "the means," by which the fire destroying the goods happened.

We think that this reasoning cannot prevail. Fire destroyed the goods. The fire was not communicated to the goods, nor to the building from which it spread, by the rebel forces, nor by any person acting in co-operation with them, nor was it so communicated in any wise in furtherance of the rebellion, its purposes or objects. No act of the rebels in any physical sense caused the fire. There is nothing to justify the inference that the rebels would have destroyed the Government stores found in the city-hall, by fire or otherwise, nor to justify the inference that the destruction of the goods, or any loss thereof, would have happened to the plaintiffs, by the capture and the occupation of the city by the rebels. As matter of fact, there was no connection, direct or by necessary inference, between such destruction of the goods and the attack of the rebels, the capture of the United States forces, and the occupation of the city.

53 But it is said that such attack by a superior armed force created a military necessity that the Government stores should be destroyed, which destruction, in the manner in which alone it could be done, involved the destruction of the plaintiffs' goods, and so that destruction was the necessary result of the attack; that the fire being thus the necessary result of the attack, it "happened by means" thereof.

The fire was actually and voluntarily communicated to the city-hall by the military authority of the United States.

It is conceded on this trial that in the exigency it was a lawful exercise of such military authority. The power was discretionary, and if the circumstances were such as made it discreet—and no doubt they were—such setting fire to the city-hall may have been a duty. In saying that

it was voluntary, we only mean that it was not a physical necessity, nor the physical result of any agency or act of the rebels, or of their unlawful or usurped power. It was physically independent of them, hostile to them, and an act which they not only did not commit, but would not have committed, and would, if possible, have prevented.

54 What is called a military necessity was, therefore, nothing more than this: It constituted the motive, and no doubt the sufficient motive, to the burning of the city-hall. This was not even an act of resistance to the attack upon the city, it was no part of the defence, nor a force employed in anywise in maintainance of the authority or possession of the Government. It was done in an exercise of military discretion, for the incidental purpose of preventing an accession to the means of the rebels for maintaining their rebellion.

The importance of preventing such an accession to their means furnished a motive, and it may be conceded a controlling motive, to the burning of the city-hall, but that did not make the fire happen by means of anything done by them. In a certain sense it may be true that the city-hall was set on fire by reason of the attack upon the city by an armed force of rebels; but between that attack and the fire was interposed another actor, who caused the fire, who set in operation the means by which it happened. An efficient and a sufficient cause of fire and the means by which it happened intervened between the acts of the rebels and the fire itself, and a cause or means without which (notwithstanding the acts of the rebels) the fire would not have happened at all.

55 In the language of Mr. Justice Miller, in the Supreme Court of the United States, in Insurance Company v. Tweed, (7 Wallace, 52:)

"If a new force or power has intervened, or itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." That language was used in reference to a similar provision in a policy of insurance, and in aid of the enquiry by what "means" the fire happened. There, as in this case, there was, in some sense, another cause but for which the fire would not have happened at all; and the opinion shows that *for* the existence of just such an influential cause is not enough to bring a case within the proviso. The facts here are much stronger than the reasoning there in withdrawal of the case from the operation of the proviso, because, although the fire would not have happened but for the existence of such remote cause, (the attack by the rebels,) it is equally true that such remote cause would not have produced the fire at all.

To apply the criterion suggested by Mr. Justice Miller, there was here the intervention of distinct, new, affirmative power and force, other than the acts of the rebels, not only sufficient but efficient, as the cause of the fire in the city-hall, and the actual means by which it happened.

56 *Nor* think, therefore, that it cannot hold that within the meaning of the proviso in question the fire which destroyed the plaintiffs' goods happened by means of the rebellion, or of anything done by the rebel forces.

2. An obvious enquiry is suggested by the facts stated, whether the setting on fire of the city-hall was the cause of the loss in such sense that, within the proviso, it was "the means" by which the fire happened, or whether that also was not the remote cause of the fire which destroyed the plaintiffs' goods.

In our preceding discussion we have assured that the setting on fire of the city-hall was the means of the fire to the plaintiffs' goods, within

that proviso, unless the rebellion or the acts of the rebels should be held to be such means. That in this sense the acts of the lawful military authorities of the United States were the proximate and efficient cause and means by which the fire happened and of the destruction of those goods by fire.

We do not find it necessary to discuss the question, what was the proximate and what was the remote cause of such destruction under this head. The suggestion that the setting on fire of the city-hall was only the remote cause, while the casual and incidental communication of the fire to the plaintiffs' store from the burning building next
57 adjacent thereto was the proximate cause of the fire, and the means by which the fire happened, within the meaning of the said proviso, is not made by the counsel for either of the parties. The contrary is conceded, if not, in truth, insisted upon, by both. The decision by the Supreme Court in the Insurance Company vs. Tweed was assured by both to be decisive against such a suggestion. We are therefore not called upon to pursue that subject.

3. It remains to consider the claim of the defendant, that the fire happened by means which exempt the company from liability, upon the ground that it was caused by "military power," and was therefore within the very words of the proviso; it is insisted by the plaintiffs that the word "military," in the connection in which it is found in the proviso, does not mean the lawful military power of the Government acting lawfully in the performance of the proper duty of the Government forces, whether engaged in hostile contest with an invading army or in a forcible endeavor to suppress an internal rebellion.

For reasons which seem to us convincing, we are of opinion that the word "military," in the proviso in question, has no reference to the lawful acts of the military forces of the Government. Neither the reasons for the insertion of the proviso
58 in policies of insurance against fire, nor the history of that insertion, nor any judicial discussions upon the meaning and purport of the proviso, nor the discussions had upon its construction with especial reference to the meaning of other terms employed therein, sustain the interpretation for which the defendant contends. It is true that the precise question, what is the import and legal effect of the word "military," does not appear to have been decided in any case to which our attention is called; and had that proviso been now for the first time employed to exempt the defendant from a portion of the liability which the preceding general agreement for insurance imports, there would be much plausibility in the argument that the defendant intended not only to exclude liability for the consequences of an insurrection, invasion, or rebellion, but for the possible consequences of those violent & forcible means which may be necessary to repel or suppress it. And yet, if this was the intent, it may be pertinently *be* asked why was the exemption limited to the employment of military force, and not made to include the forcible and violent measures which municipal authorities or police organizations might find it necessary to employ to suppress a riot, insurrection, or other civil commotion?

59 The proviso containing the words "military or usurped power" was inserted in policies as early as 1720; and the history of the subject, as given in Ellis on Insurance, &c., (p. 41, &c.,) Park on Insurance, (657,) Marshal on Insurance, (791, &c.,) shows that the occasion thereof was manifestly the liability to loss by fire caused by a foreign enemy and invasion. And the terms "military or usurped power" were used in reference to the existence of claims to the exercise of gov-

ernmental authority enforced within the kingdom and constituting rebellion against the recognized government. The clause originally embraced no other terms than were apt to indicate the violence of enemies from abroad, and of usurpation exercising governmental authority or rebellion sustained by organized forces within the kingdom.

The exception, as then introduced into policies, read as follows: "No loss or damage by fire happening by any invasion, foreign enemy, or any military or usurped power whatsoever will be made good by this company."

The idea of interference with the peace and safety of the realm by organized force from abroad, or rebellion rising to the proportions of actual or at least formal usurpation of governmental authority, (whether more or less successful,) and manifestly hostile to the lawful government, is indicated by this language. The experience of the country in those days of not infrequent invasion and rebellion, the result of disputes touching the right or the succession to the crown of England, gave occasion for the exception, and, by suggesting its cause, furnished also an explanation of its meaning. Foreign invading armies, and the organized forces rallied in whole or in part within the kingdom to overturn the government or to enforce the alleged title of a claimant to the crown, usurping and endeavoring forcibly to usurp governmental authority, were in view. Reason for refusing to become liable for losses caused by these forces, in either form, is found not only in helplessness and inability to resist them, & the magnitude of the destruction they may effect, but in the want of recourse for indemnity to those who commit the violence. It is well and pertinently suggested that while on the one hand no one would think of obtaining insurance against the lawful acts of the government, so on the other an insurer would not think of excepting such lawful acts as a cause of the fire against which he insured. The citizen without insurance, and an insurer making insurance, if that contingency was contemplated, would regard his government as bound and presumptively always ready to indemnify against losses sustained by acts done in its own defence or in maintaining the authority of the laws.

The subsequent extension of the proviso to "riot, insurrection, and civil commotion," rather confirms than impairs this view of the meaning and intent of the original proviso, and these were held to import occasional local or temporary outbreaks or lawless violence; and such, though temporarily destructive in their effect, did not rise to the proportions or organized rebellion against the government.

The observations made by the court in the few early cases in which this proviso came under consideration, (although any possible separate meaning of the word "military" is not suggested,) indicate that the clause has reference to acts done in disregard or in subversion of lawful authority, and includes only such affirmative acts. (Drinkwater vs. London Assurance Comp'y, 2 Wilson, 363; Langdale vs. Mason, referred to by the text witness above cited. In the last-named case Lord Mansfield used this significant language: "What is meant by military or usurped power? They are ambiguous, and they seem to have been the subject of a question and determination. They must mean rebellion where the fire is made by authority; as, in the year 1745, the rebels came to Derby, and if they had ordered any part of the town or a single house to be set on fire, that would have been by authority of a rebellion. That is the only distinction in the case. It must be by rebellion got to such a head as to be under authority."

The term military is employed in the proviso in a meaning synonymous with the usurped power intended to be described, or as qualifying and explaining what was meant by usurped power. It was in this view, and as a ground of distinguishing between the usurped power specified in the proviso and the power of a mob, that Mr. Justice Bathurst, in the case of Drinkwater, construed usurped power to mean either an invasion by foreign enemies, to give laws and usurp the government thereof, or an internal force or rebellion, assuming the power of the government, by making laws and punishing for not obeying those laws. "An invasion" necessar'y supposed organization and military power or force; so of the words "foreign enemy;" and in the use of a phrase which would include also violence within the kingdom, viz, "military or
63 usurped power," something in like manner hostile to or subversive of the laws and of lawful government was intended as plainly as if the clause had been, "or any other military or usurped power."

That the terms used in the proviso have express application to force illegally employed and adverse to the government is indirectly but implicably involved in the decision and opinion of the court in the City Fire-Insurance Company vs. Curties, (21 Wendell, 307.) The court deemed the meaning of the words usurped power long settled.

The property there in question was destroyed by order of the mayor of the city of New York, for the purpose of arresting a conflagration. It was claimed that this was a usurpation of power and authority in disregard of the law. The court deemed that, if the mayor held no authority to do the act, the company were still liable, for that it was not usurpation of the power of government, "against which the defendants intended to protect themselves." The case of Sprull vs. North Carolina Ins. Co. (1 Jones N. Car. Law R., 126,) tends strongly in the same direction; and, if an armed patrol may be deemed a military power, that case is especially pointed and significant.

64 These considerations and the significant fact that every other word used in this proviso to designate the means by which a fire may happen, for which the company will not be liable, expresses clearly and unequivocally what is unlawful employed in disregard or in subversion of the laws or the government, furnish a strong case for the application of the maxim relied upon by the plaintiffs, noscitur a sociis. This maxim is not conclusive; but in a case of doubt, and where like meaning will satisfy the provision, where there is no other clause or language hostile to the like interpretation, especially where other considerations tend to support it, the maxim has special force and significance.

We think it not too much to say that most, if not all, intelligent readers of the proviso in question, would at once declare that the word military therein was employed in a sense kindred to the other terms, and that it described an organization military in its form, but unlawful and hostile to the government in its character and purpose.

Again, it is a familiar rule in the construction of provisos and exceptions of the sort made in qualification of the general positive
65 agreement, that words susceptible of either construction should be taken most strongly against the speaker or party whose language is to be interpreted, and that the general positive agreement should have effect, unless the exception clearly withdraws the case from its operation. This has especial force when the other considerations pertaining to the subject tend to the same result.

To this it should be added, that it is the duty of an insurance com-

pany, seeking to limit the operation of its contract of insurance by special provisos of exceptions, to make such limitations in clear terms, and not leave the insured in a condition to be misled. The uncertainties arising from provisos, exceptions, qualifications and special conditions in or endorsed upon policies have been often condemned, and such special modifications are justly charac terized as traps to deceive and catch the unweary.

An insured may reasonably be held entitled to rely on a construction favorable to himself, where the terms will rationally permit it; where, as in [illegible] case, such construction gives a signification to a word ejusdem [illegible] neris of all those with which it is found associated and in harmony with the general character and purpose of the provision [illegible] which they are found, he is already entitled to insist upon such [illegible] on.

[illegible] construction is, that the plaintiffs are entitled to judgment for the amount of the insurance, with interest thereon from the expiration of sixty days from the second day of May, 1865, on which day it is admitted the preliminary proofs of loss were furnished to the defendant, that is to say, with interest from the first day of July, 1865, and with costs.

And on the 19th day of May, 1874, Messrs. Butler, Stillman & Hubbard entered formal appearance for the defendants.

And on the 1st day of June, A. D. 1874, an execution for the amount of said judgment against the defendants was issued to the plaintiffs, which was thereafter, on the 17th day of August, A. D. 1874, returned unsatisfied, and on the same day an alias execution for the amount of judgment, with interest thereon to date, was issued, which has never been returned.

66½ And on the 13th day of July, A. D. 1874, in vacation, on the application of the attorneys of the defendant, the circuit judge made an order in said matter in the words following, viz:

67 U. S. circuit court.

WILLIAM C. BOON ET AL.
ags't
THE ÆTNA INSURANCE COMPANY.

Upon all the pleadings and proceedings in this action, and upon the affidavits and papers hereunto annexed, let the plaintiffs, or their attorney, Francis Fellows, show cause before me at my chambers in Litchfield, Connecticut, on the 16th day of July, 1874, at 10 o'clock in the forenoon, why defendant should not have leave to make and serve a case or bill of exceptions herein, to contain the evidence given on the trial, special findings of fact and law, to be signed by the court or one of the justices who presided on said trial, and such exceptions thereto as defendant may desire to make, and why said case or bill of exceptions when made and settled should not be filed nunc pro tunc, as of the term when the judgment herein was entered, and why a stay of
68 execution herein should not be granted until after the decision of a justice of the Supreme Court shall be made upon defendant's application upon the papers and proceedings herein, pursuant to the act of Congress of June 1, 1872, for leave to file the security required by

law for a stay of proceedings on said judgment and execution pending said appeal, or why defendant should not have such other or further relief or order as may be proper; and meantime, and until the decision of said motions, let all proceedings on the part of plaintiff upon said judgment and execution be stayed.

L. B. WOODRUFF,
Circuit Judge.

And on the 22d day of August, A. D. 1874, the parties filed in court the following stipulation as to the hearing on the foregoing order, viz:

69 U. S. circuit court.

WILLIAM C. BOON ET AL.
agst.
THE ÆTNA INSURANCE COMPANY.

It is hereby stipulated and consented, that the order to show cause why the defendant should not have leave to make a case or bill of exceptions herein, made by his honor, Mr. Justice Woodruff, returnable before him in Litchfield, Connecticut, on the 16th instant, be postponed to July 17th, 1874, and be brought on before his honor, Judge Shipman, at Hartford, Connecticut, at the judge's chambers, at 10 in the forenoon on said day, with the same force and effect as if said order had originally been made returnable before him, and that defendant shall also have all the benefit and provisions contained in said order, with like force and effect; reserving, however, to plaintiff the right to urge any objection which plaintiff may leave to the jurisdiction of said court, or any judge thereof, to entertain such an application after the expiration of the term at which judgment was entered or rendered.

Dated New York, July 15, 1874.

BUTLER, STILLMAN & HUBBARD,
Defts.' Attys.

FRANCIS FELLOWES,
Atty. for Plff.

70 And the parties having been fully heard on said application, in accordance with the foregoing stipulation, on the 22d day of August, A. D. 1874, the following order was passed & filed, viz:

Circuit court of the U. S. for district of Connecticut.

WM. C. BOON ET AL.
vs.
ÆTNA INSURANCE COMPANY.

Upon application of defendants in above-entitled cause to have a special finding of facts therein made and signed by the circuit court, or the judges thereof, nunc pro tunc, as of the April term, A. D. 1874, of said court, and for other relief, as by the order to show cause, on file, will more fully appear; which application was heard by stipulation of the parties, also on file, before me on the 17th day of July, A. D. 1874, upon affidavits on file, and the counsel of plaintiffs and defendants respectively being heard thereon, ordered, that a finding of facts in the above-entitled cause, with the conclusions of the court thereupon, con-

pany, seeking to limit the operation of its contract of insurance by special provisos of exceptions, to make such limitations in clear terms, and not leave the insured in a condition to be misled. The uncertainties arising from provisos, exceptions, qualifications and special conditions in or endorsed upon policies have been often condemned, and such special modifications are justly charac terized as traps to deceive and catch the unweary.

An insured may reasonably be held entitled to rely on a construction favorable to himself, where the terms will rationally permit it; where, as in this case, such construction gives a signification to a word ejusdem generis of all those with which it is found associated and in har-
66 mony with the general character and purpose of the provision in which they are found, he is ~~already~~ clearly entitled to insist upon such construction.

Our construction is, that the plaintiffs are entitled to judgment for the amount of the insurance, with interest thereon from the expiration of sixty days from the second day of May, 1865, on which day it is admitted the preliminary proofs of loss were furnished to the defendant, that is to say, with interest from the first day of July, 1865, and with costs.

And on the 19th day of May, 1874, Messrs. Butler, Stillman & Hubbard entered formal appearance for the defendants.

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67 U. S. circuit court.

WILLIAM C. BOON ET AL.
ags't
THE ÆTNA INSURANCE COMPANY.

Upon all the pleadings and proceedings in this action, and upon the affidavits and papers hereunto annexed, let the plaintiffs, or their attorney, Francis Fellows, show cause before me at my chambers in Litchfield, Connecticut, on the 16th day of July, 1874, at 10 o'clock in the forenoon, why defendant should not have leave to make and serve a case or bill of exceptions herein, to contain the evidence given on the trial, special findings of fact and law, to be signed by the court or one of the justices who presided on said trial, and such exceptions thereto as defendant may desire to make, and why said case or bill of exceptions when made and settled should not be filed nunc pro tunc, as of the term when the judgment herein was entered, and why a stay of
68 execution herein should not be granted until after the decision of a justice of the Supreme Court shall be made upon defendant's application upon the papers and proceedings herein, pursuant to the act of Congress of June 1, 1872, for leave to file the security required by

law for a stay of proceedings on said judgment and execution pending said appeal, or why defendant should not have such other or further relief or order as may be proper; and meantime, and until the decision of said motions, let all proceedings on the part of plaintiff upon said judgment and execution be stayed.

L. B. WOODRUFF,
Circuit Judge.

And on the 22d day of August, A. D. 1874, the parties filed in court the following stipulation as to the hearing on the foregoing order, viz:

69 U. S. circuit court.

WILLIAM C. BOON ET AL.
agst.
THE ÆTNA INSURANCE COMPANY.

It is hereby stipulated and consented, that the order to show cause why the defendant should not have leave to make a case or bill of exceptions herein, made by his honor, Mr. Justice Woodruff, returnable before him in Litchfield, Connecticut, on the 16th instant, be postponed to July 17th, 1874, and be brought on before his honor, Judge Shipman, at Hartford, Connecticut, at the judge's chambers, at 10 in the forenoon on said day, with the same force and effect as if said order had originally been made returnable before him, and that defendant shall also have all the benefit and provisions contained in said order, with like force and effect; reserving, however, to plaintiff the right to urge any objection which plaintiff may leave to the jurisdiction of said court, or any judge thereof, to entertain such an application after the expiration of the term at which judgment was entered or rendered.

Dated New York, July 15, 1874.

BUTLER, STILLMAN & HUBBARD,
Defts.' Attys.

FRANCIS FELLOWES,
Atty. for Plff.

70 And the parties having been fully heard on said application, in accordance with the foregoing stipulation, on the 22d day of August, A. D. 1874, the following order was passed & filed, viz:

Circuit court of the U. S. for district of Connecticut.

WM. C. BOON ET AL.
vs.
ÆTNA INSURANCE COMPANY.

Upon application of defendants in above-entitled cause to have a special finding of facts therein made and signed by the circuit court, or the judges thereof, nunc pro tunc, as of the April term, A. D. 1874, of said court, and for other relief, as by the order to show cause, on file, will more fully appear; which application was heard by stipulation of the parties, also on file, before me on the 17th day of July, A. D. 1874, upon affidavits on file, and the counsel of plaintiffs and defendants respectively being heard thereon, ordered, that a finding of facts in the above-entitled cause, with the conclusions of the court thereupon, con-

formably to the opinion of the court heretofore filed, be prepared
71 by the defendants and submitted to the plaintiffs, to be approved and signed by the court at the September term of the circuit court, to be holden at Hartford, on the 3d Tuesday of September, A. D. 1874, and that defendants have leave to prepare a bill of exceptions, which shall be allowed and signed by the judges of said court at said term; which said special finding of facts and bill of exceptions shall be made and allowed and entered of record, nunc pro tunc, as of the April term, 1874, of said court, and that execution be stayed for thirty days after the allowance of said bill of exceptions, to enable the defendants to apply for and obtain an order of a justice of the Supreme Court of the U. S., giving leave to the defendants to file the security required by law for a stay of proceedings on said judgment and execution, pending a writ of error to the Supreme Court of the United States.

N. SHIPMAN,
District Judge.

And in conformity with the foregoing order, on the first day of term of said court held at Hartford, on the third Tuesday of September, A. D. 1874, a special finding of facts and bill of exceptions were
72 signed and filed, and are entered as of the April term, 1874, nunc pro tunc, and were and are in the words and figures following, viz:

Circuit court of the United States for the district of Connecticut.

WM. C. BOON ET AL.
against
THE ÆTNA INSURANCE COMPANY.

Finding of facts.

In this case, by written stipulation of the parties, a jury was waived, and the case tried by the court instead of the jury.

Upon the proofs and the admissions of the parties made in open court we find the following facts:

First. That the plaintiffs, at the time of bringing said suit, were citizens and actual residents of States of the United States other than the State of Connecticut as alleged in the declaration, and defendant at said time was a citizen of and resided in said State of Connecticut as alleged.

73 Second. That the loss provided against by the policy of insurance upon which this suit is brought, occurred within the term of the insurance, on the fifteenth day of October, 1864, and was sufficiently great to entitle the plaintiffs to recover, if the defendants were liable at all, the whole sum insured, viz, $6,000, and has never been paid.

Third. That the plaintiffs have complied with all the terms and conditions of the policy, by the payment of premiums, furnishing proper preliminary proofs of loss and compliance with the requirements of the policy, and that the sixty days from the date of furnishing the preliminary proofs of loss to the defendants expired July first, 1865.

Fourth. That the policy, which was duly executed by the defendant and delivered to the plaintiffs, contained the following express provisions, annexed to the agreement of insurance and in the body of the policy, namely:

"Provided always, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen

or take place by means of any invasion, insurrection, riot, or civil
74 commotion, or of any military or usurped power, or any loss by theft at or after a fire."

Fifth. That the facts and circumstances showing the cause of the fire are as follows, namely: At and before the time of the fire in question, the city of Glasgow, within which the said store of the plaintiffs was situated, was occupied as a military post of the United States, by the military forces and a portion of the army of the United States engaged in the civil war then, and for more than three years theretofore, prevailing between the Government and the citizens of several Southern States who were in rebellion and seeking to establish an independent government, under the name of the Confederate States of America. As such military post, the said city of Glasgow was made the place of deposit of military stores for the use of the Army of the United States, which stores were in a building called the city-hall of the said city of Glasgow, situated on the same street, on the same side of the street, and about one hundred and fifty feet distant from the plaintiffs' said store, three buildings, nevertheless, being located in the intervening space, not, however, in actual contact with either. Colonel Chester Harding, an officer
75 of the United States Government, and in command of the military forces of the United States, held the possession of the said city, and had lawful charge and control of the military stores aforesaid. On the fifteenth day of October, 1864, an armed force of the rebels, under military organization, surrounded and attacked the city at an early hour in the morning, and threw shot and shell into the town, penetrating some buildings, and one thereof penetrating the said store of the plaintiffs, but without setting fire thereto or causing any fire therein, and some of said shell killing soldiers and citizens. The city was defended by Colonel Harding and the military forces under his command, and battle between the loyal troops and the rebel forces continued for many hours. The citizens fled to places of security, and no civil government prevailed in the city. The rebel forces were superior in numbers, and, after a battle of several hours, drove the forces of the Government from their position, compelled their surrender, and entered and occupied the city.

During the battle, and when the Government troops had been driven from the exterior lines of defence, it became apparent to Colonel
76 Harding that the city could not be successfully defended, and he thereupon, in order to prevent the said military stores from falling into the possession of the said rebel forces, ordered Major Moore, one of the officers under his command, to destroy them.

In obedience to this order to destroy the said stores, and having no other means of doing so, Major Moore set fire to the said city-hall, and thereby the said building, with its contents, was consumed. Without other interference, agency, or instrumentality, the fire spread along the line of the street aforesaid to the building next adjacent to the city-hall, and from building to building through two other intermediate buildings to the store of the plaintiffs, and destroyed the same, together with its contents, including the goods insured by the defendant's policy aforesaid. During this time, and until after the fire had consumed such goods, the battle continued, and no surrender had taken place, nor had the forces of the rebels, nor any part thereof, obtained the possession of or entered the city.

It was conceded that the order of Colonel Harding was, in the exi-
gency, a lawful and discreet use of the military authority vested
77 in him.

The conclusions of law upon the foregoing facts are that the defendants are liable to the plaintiffs upon their said policy of insurance for said loss, and that they are not exempted by virtue of the said proviso from liability to the plaintiffs under said policy, and that the plaintiffs are entitled to judgment for said sum of six thousand dollars, with interest thereon from said first day of July, 1865, and with costs.

L. B. WOODRUFF,
Circuit Judge.
N. SHIPMAN,
District Judge.

78 United States circuit court.

WILLIAM C. BOON & OTHERS
vs.
THE ÆTNA INSURANCE COMPANY.

Defendant's bill of exceptions.

Afterwards, to wit, at a circuit court held in and for the district of Connecticut, at the court-house in the city of Hartford, at the September term of said court, 1873, before the honorable Lewis B. Woodruff, circuit judge, and the honorable Nathaniel Shipman, district judge, and without a jury, a trial by jury having been duly waived, according to the form of the statute in such case made and provided, the aforesaid issue, so joined between the said parties, as aforesaid, came on to be tried.

At which time came there as well the said plaintiff and the said defendant, by their respective attorneys aforesaid. And upon the
79 trial of that issue evidence was produced by the respective parties tending to establish the facts found by the court in the special findings filed herein and made part of the record.

Whereupon the said counsel for said defendant did then and there insist before the said judges on behalf of said defendant, that the said several matters so produced and given in evidence on the part of the said defendant as aforesaid, and the facts so found by the court as aforesaid, were sufficient to entitle the defendant to judgment in this cause, and to bar the said plaintiffs of their action aforesaid. And the said judges did then and there, to wit, at the April term of this court, 1874, find, declare, and deliver their opinion that the said several matters so introduced in evidence and found as aforesaid were not sufficient to bar the said plaintiffs of their action aforesaid. Whereupon the said counsel for the said defendant, on behalf of said defendant, and within the time allowed by the court for that purpose in its orders as on file, did except to the aforesaid conclusions of law, opinion, and judgment of the said judges, and separately to each and every part thereof,
80 and insisted on the said several matters as an absolute bar to the said action upon said policy.

And the said judges did then and there find and adjudge, as conclusions of law upon all of the facts so found in said case, that said defendants are not exempted from liability to the plaintiffs by virtue of the proviso in said policy which prescribed that defendant should not be liable to make good any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, or any loss by theft at or after a fire, and that plaintiffs are entitled to judgment for said sum of six

thousand dollars, with interest thereon from said first day of July, 1865, and with costs; to which said conclusions of law and each of them separately said counsel for defendant did, on the behalf of said defendant, and within the time aforesaid, duly except.

And within the time limited by the court for that purpose, the said counsel for the defendant did propose their aforesaid exceptions to the said conclusion of law, and requested the said judges to put their seal to this bill of exception, containing the several matters so produced
81 and found as aforesaid, according to the form of the statute in such case made and provided, and thereupon the said circuit and district judges at the request of the said counsel for the said defendant did put their seals to this bill of exceptions, pursuant to statute, on the 15th day of September, as of the said April term, A. D. 1874, in accordance with the order of the said court made in that behalf and entered herein.

N. SHIPMAN, [SEAL.]
District Judge.
L. B. WOODRUFF, [SEAL.]
Circuit Judge.

And on the same day the further order of court was made in this behalf, in the words and figures following, viz:

82 At a stated term of the circuit court of the United States for the second circuit and district of Connecticut, held before the judges of the said court, at the city of Hartford, on the third Tuesday of September, A. D. 1874.

Present, Hon. L. B. Woodruff, circuit judge; Hon. Nathaniel Shipman, district judge.

WM. C. BOON ET AL.
vs.
ÆTNA INSURANCE CO.

This cause having come on to be tried at the September term of this court, held in the city of Hartford, on the third Tuesday of September, A. D. 1873, and (a trial by jury having been duly waived by the parties thereto) the same having been tried by the court, and the said court having taken the same under advisement upon the allegations
83 and proofs of the parties respectively, and at the then next term of said court, to wit, at the April term, A. D. 1874, thereof, the said court having filed, announced, and declared their findings of facts upon the evidence, with their conclusions of law thereupon, which findings of facts and conclusions of law were embodied in the opinion of the court in writing, announced and declared in open court, and filed in said cause, wherein and whereby judgment was directed to be entered for the plaintiffs herein, and the defendants herein being desirous of having such findings of fact and conclusions of law stated separately from the said opinion, and to prepare and tender its bill of exceptions to said conclusions, but through misapprehension having failed to make application therefor at the said April term, and having applied heretofore, by motion, to one of the judges of this court, for that purpose, who after hearing said parties did, for cause shown, order and direct as follows, to wit:

Circuit court of the United States, district of Connecticut.

84 WILLIAM C. BOON ET AL.
vs.
THE ÆTNA INSURANCE CO.

Upon application of defendants in above-entitled cause to have a special finding of facts therein made and signed by the circuit court or the judge thereof, nunc pro tunc, at the April term, A. D. 1874, of said court, and for other relief as by the order to show cause on file will more fully appear, which application was heard by stipulation of parties, also on file, before me on the 17th day of July, A. D. 1874, upon affidavits on file, and the counsel of plaintiffs and defendants respectively being heard thereon:

Ordered that a finding of facts in the above-entitled cause, with the conclusions of the court therein conformably to the opinion of the court heretofore filed, be prepared by the defendants and submitted to the plaintiffs, to be approved and signed by the court at the September term of the circuit court to be holden at Hartford on the third Tuesday of September, A. D. 1874; at that the defendants have leave to pre-
85 pare a bill of exceptions which shall be allowed and signed by the judges of said court at said term, which said special finding of facts and bill of exceptions shall be made and allowed and entered of record, nunc pro tunc, as of the April term, 1874, of said court, and that execution be stayed for thirty days after the allowance of said bill of exceptions to enable the defendant to apply for and obtain an order of a justice of the Supreme Court of the United States giving leave to the defendants to file the security required by law for a stay of proceedings on said judgment and execution pending a writ of error to the Supreme Court of the United States.

(Signed) N. SHIPMAN,
District Judge.

Now at this next ensuing term of said court, the parties appearing by their respective counsel and producing the order last mentioned, with the proofs whereon the same was founded, now on file herein, together with such separate finding of fact and conclusions of law, and the
86 defendants' said bill of exceptions thereto, after hearing counsel for the respective parties, and on motion of counsel for the defendant, the plaintiffs' counsel opposing said motion and insisting that the said judge in vacation had no jurisdiction to make the order aforesaid, and that the court now here is without jurisdiction to make the order hereinafter contained:

It is ordered that the said order above recited be, and the same is hereby, made the order of the court in this cause, and that the said separate findings of facts and conclusions of law, and the said bill of exceptions, be signed by the judges of this court and duly allowed, and be filed, nunc pro tunc, as of the said April term, A. D. 1874, and that the same and this order be made part of the record of said cause; and that execution be stayed for thirty days after the allowance of said bill of exceptions to enable the defendant to apply for and obtain an order of a justice of the Supreme Court of the United States, giving
87 leave to the defendant to file the security required by law for a stay of proceedings on said judgment and execution, pending a writ of error to the Supreme Court of the United States.

L. B. WOODRUFF,
Circuit Judge.

And, on the 7th day of October, A. D. 1874, the further *of* order of the circuit justice presiding within the second circuit & district of Connecticut was made and entered in this behalf, in the words and figures following, viz:

88 U. S. circuit court.

WILLIAM C. BOON ET AL.
vs.
THE ÆTNA INSURANCE COMPANY.

On reading papers upon defendant's application to me, a justice of the Supreme Court of the United States, for permission to give the security required by law to stay proceedings in this action, pending the writ of error to be issued therein, pursuant to section eleven of the act of Congress for the further administration of justice, passed June 1st, 1872; and it appearing that proper findings of fact and law, and a bill of exceptions, have been made and filed herein; that more than sixty days have elapsed since judgment therein was entered; and after hearing G.
W. Parsons, of counsel for said defendant, in support of said
89 application, Mr. Scott Lord in opposition thereto, I do hereby order and direct, pursuant to and by virtue of said act of Congress, that said application be granted; and that upon perfecting the appeal referred to in said papers, by the issuing of the writ of error referred to, the defendant have permission to give the usual security required by law to stay proceedings upon said judgment on the part of plaintiffs during the pendency of said writ of error; and that upon such security being given and approved by either the district or circuit judge before whom said action was tried, said proceedings be so stayed.

Sept. 24, 1874.

WARD HUNT,
Ass. Just. Sup. Ct. U. S.

Attest:
LOREN P. WALDO, *Clerk.*

90 UNITED STATES OF AMERICA,
District of Connecticut, ss:

I, Loren P. Waldo, clerk of the circuit court of the United States for the district of Connecticut, do certify that the annexed papers are true copies of the original process, pleading, judgment, and proceedings in the matter of William C. Boon and others vs. The Ætna Insurance Company, on file in said court.

In testimony whereof I have set hereto my name officially and the seal of said court, at Hartford, in said district, this 31st day of October, A. D. 1874.

LOREN P. WALDO, *Clerk.*

91 Supreme Court of the United States.

ETNA INSURANCE COMPANY, PLAINTIFF IN error,
vs.
WILLIAM C. BOON ET AL., DEFENDANTS IN error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-four.

Afterwards, to wit, on the second Monday of October, in this same

term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Etna Insurance Company, by William Hamersly, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: that, by the record aforesaid, it appears that the judgment aforesaid given was given for the said William C. Boon, Horatio N. Bostwick,
92 Isaac Pearson, and Benjamin Smith, partners in business under the name of Boon, Bostwick and Company, against the said Etna Insurance Company; whereas by the law of the land the said judgment ought to have been given for the said Etna Insurance Company against the said William C. Boon and others. And the said Etna Insurance Company prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of said judgment; and that the said William C. Boon and others may rejoin to the said errors.

WM. HAMERSLY,
Attorney for Plaintiff in Error.

(Indorsement on cover:) No. 774. The Ætna Insurance Company, plaintiff in error, vs. William C. Boon, Isaac Pearson, Horatio N. Bostwick, and Benjamin Smith, partners as Boon, Bostwick & Company. Connecticut C. C. U. S. Filed 4th January, 1875.

37

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

U. S. Supreme Court.

THE ÆTNA INSURANCE COMPANY,
Plaintiff in Error,

against

WILLIAM C. BOON, ET AL.,
Defendants in Error.

Appeal from the Circuit Court of United States for the District of Connecticut.

Brief for the Ætna Insurance Company.

Statement of the Case.

This action was brought by the defendant in error, to recover $6,000 and interest, upon a policy of insurance dated September 2d, 1864, covering a stock of merchandize, in a store in the town of Glasgow, Missouri. The policy is set out at length in the original process (pp. 4–13).

The plea was the general issue with notice of special matter (pp. 14 and 15). The case was tried in September, 1873, before Judges Woodruff and Shipman, without a jury, by stipulation pursuant to statute. The court rendered judgment for defendant in error on the 28th of April, 1874, for $9,250.26. The special finding by the court shows the following facts (pp. 24–26).

In October, 1864, and for some years previous, the United States Government was involved in a civil war with a large portion of what are known as the Southern States.

The war originated in an insurrection or rebellion of those Southern States, the purpose of the insurgents being, as declared by them, to sever from the United States Government certain of the Southern and Middle States, and establish an independent government to be known as the Confederate States.

Secession ordinances were passed by the Legislatures of the Southern States, armies were organized for carrying on the rebellion to overthrow the United States Government, and conquer and hold such of its territory as they might be able, and include it under such independent government.

At the time hereinafter named, the Rebel armies had succeeded in conquering and holding a large part of the territory of the Southern States, had established and maintained over them all the forms of a separate government; which, by several independent national powers, and in various ways by the United States Government, had been recognized as a *de facto government.*

On the 15th day of said October, and for some months previous (one witness said two years), certain United States forces engaged in that war, and under the command of Col. Harding, were occupying this small city of Glasgow, in Missouri, as a military post, and the City Hall in said city was made the deposit of military stores for the use of the army of the United States. This place was part of the territory of the United States, and in one of the loyal States (p. 25).

On the day last named, a large armed force of the Rebels surrounded and attacked the town at an early hour in the morning, and with their artillery threw both shot and shell into the midst of the town, penetrating buildings and killing citizens and soldiers. The citizens generally fled, or endeavored to protect themselves by going into their cellars. There was no civil government or order prevailing in the city; the manifest object of the Rebels was to capture the city and subject it to the Rebel government. At least, one

of these shells atruck and penetrated the building occupied by plaintiffs (p. 25).

It does not appear that the fire in question originated from these shells.

The battle lasted till late in the day, when the Union troops surrendered to the Rebel forces, and the latter entered and occupied the town.

It was during the battle that the fire in question occurred.

The Rebel forces were much superior in numbers, and within a few hours overrun the Union camps, drove the Union forces upon their interior lines, and finally compelled them to surrender.

After the battle had been in progress for several hours, and when the Government troops had been so driven in, it became apparent to the Commander of the United States forces, that the position could not be successfully defended, and in order to prevent the military stores, which were in the City Hall building, from falling into the possession of the Rebel forces, so engaged in such insurrection, invasion or rebellion, and endeavoring to establish and sustain a military and usurped power over that portion of the United States territory, the Commander ordered the said stores to be destroyed. He determined that to be a *military necessity*. Accordingly, those stores, and the building so containing them, were set on fire, and the whole were consumed.

The falling of the City Hall tower, or steeple, during the fire, caused it to communicate to one Eberle's house, and from thence through two adjoining buildings, to the premises of plaintiff, which was about 150 feet distant from the City Hall.

The battle was in active progress during the entire time of the conflagration (p. 25).

A little over a month previous to the fire, plaintiffs had obtained from defendant's agent the contract of insurance, which is the basis of this action. The policy contained the following proviso: "*This com-*

" *pany shall not be liable to make good any loss or damage* " *by fire, which may happen or take place by means of any* " *invasion, insurrection, riot, or civil commotion, or of* " *any military or usurped power,*" &c. (p. 24).

There was no question about the extent of the loss.

ASSIGNMENT OF ERRORS.

The Ætna Insurance Company, Appellant, assigns as error, in the judgment of the U. S. Circuit Court, entered as of April Term, 1874, the following:

First.—That said judgment, instead of adjudging upon the facts found by the court, that the defendant was not exempted from liability to the plaintiffs by virtue of the proviso in the policy, which prescribed that defendant should not be liable to make good any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power, should have adjudged upon such facts, that defendant was exempted from liability by virtue of such proviso.

Second.—That said judgment, instead of being for the plaintiff therein for the amount of the insurance, interest and costs, should have been for defendants therein.

Findings and Exceptions, pp. 24–27.

POINTS.

First Point.—It may be remarked, preliminarily, that it has been repeatedly held that the Southern Confederacy was, for the time being, a *de facto Government.*

Mauran v. *Insurance Company*, 6 *Wall.*, 1 and 13–14.

See also *Dole* v. *New England Marine Insurance Company*, 6 *Allen*, 382.
Dole v. *Merchants, &c., Ins. Co.*, 51 *Maine*, 465.
Fifield v. *Insurance Company*, 47 *Penn. St. R.*, 166.
Aubert v. *Gray*, 3 *B. & S.*, 163.

1. And in *Swinnerton* v. *The Columbia Ins. Co.*, 37 *N. Y R.*, it was held that the existence of the civil war in our country was a fact, of which the courts were bound to take judicial notice.

Second Point.—The main question here is, whether the loss in question occurred by means of either of the excepted risks mentioned in the policy? In other words, did the fire which destroyed the premises "happen or take place by means of any "invasion, insurrection, riot or civil commotion, "or of any military or usurped power?"

Third Point.—The language of the exemption proviso appears to be specially adapted to such a case as that at bar.

1. Let us examine it a little in detail.

Bouvier defines an insurrection to be "a re- "bellion of citizens or subjects of a country "against its government."

A "civil commotion," as defined by Lord Mansfield (2 *Marsh on Ins.*, 793), is "an insur- "rection of the people for general purposes,

"though it may not amount to rebellion, where "there is usurped power."

2. Three of the four judges in the case of *Drinkwater* v. *The Corporation of the London Assurance*, 2 *Wilson*, 365, seem to have held that the import of the words "usurped power" is "an "invasion from abroad, or an *internal rebellion*, "where armies are drawn up against each "other, where the laws are silent, and where "the firing of towns becomes unavoidable;" but that those words could not mean the power of a common mob.

3. Lord Mansfield adopted that definition in the case of Langdell *v.* Mason, cited in 2 Marsh on Insurance, p. 689, in a case, however, which involved only the meaning of the words "civil commotion."

4. In this case the query is quite immaterial. The language of the proviso and the facts of the case, it is submitted, are sufficient to place this loss clearly within the excepted risks.

Surely, there can be no question in regard to the existence of a well organized and acting "military power" on both sides; and as little question that the character of the rebel military force was that of a "usurping power;" and that it did effectually in this very instance, as well as in many others during the war, invade the place in question and usurp and maintain control by "military power."

Fourth Point.—To state the case again briefly: In consequence of the "insurrection" or rebellion of a large portion of the citizens of the Republic, having for its object the subjection of the powers of the Government, the conquering of its territory, and the establishment of a new and independent Government, the United States Government had stationed a military force in the place where the loss happened, for its protection. During the existence of such a state of affairs, this contract of insurance was made, in which the proviso above quoted was inserted. Could it have been more pointed or applicable if it had been then inserted in such a contract for the first time, and with express reference to the condition of affairs referred to?

Does not the contract in this respect, in answer to plaintiff's application for insurance, say for the "defendant: "Yes, the company will insure you, "notwithstanding that the changed occupations "of many of the citizens, and the relaxing of dis- "cipline over the dangerous classes occasioned by "the war, have largely increased the ordinary risk; "still, the *company shall not be liable to make good* "*any loss or damage by fire* which may happen or "take place *by means of any invasion, insurrection,* "*riot or civil commotion, or of any military or usurp-* "*ed power?*" And did not plaintiffs deliberately accept this contract, with this provision embraced in those few words which are prominent in the body of the policy?

Is it reasonable to contend that, nothwithstanding the use of such language, the company intended to assume such an extraordinary risk?

1. Soon after the making of the compact, a part of this usurping, invading, insurrectionary military power or organization, engaged in carrying on war openly and publicly against

the general Government, with a view of overthrowing the control of that Government over this city of Glasgow and the military power of the Government, placed there to protect it, surrounded and attacked the place, with superior force, and drove the defenders from their outer entrenchments, and in and upon their interior lines, and there came to be a certainty of their conquering the place.

The commander of the loyal forces, having determined that he would not be able to defend the place successfully, caused the military stores to be set on fire, in order to prevent their falling into the hands of the invaders, and the fire so set extended and destroyed plaintiff's property?

Did this loss "take place *by means*" of any of the causes mentioned in the proviso?

Would there have been any fire if none of the causes enumerated in that clause had existed?

Fifth Point.—One of the principal propositions urged in the court below, and approved by that court, was that the fire was caused by the lawful act of the Government forces, in the exercise of its right of eminent domain, and was not, directly nor indirectly, caused by the rebel forces.

It was conceded that the burning was justified by the condition of affairs when the order for it was given—that it was a military necessity.

But it is submitted that it is immaterial whether it was justifiable or not, as it is not questioned that the commander acted in good faith, believing in the existence of the necessity. A brief exam-

ination of the authorities will show the unsoundness of the position.

1. In the case of *Gordon* vs. *Remington*, 1 Camp., 123, decided in 1807, the action was on a policy of insurance on plaintiff's commissions and privileges, as captain of the ship *Reliance*, from Bristol to the coast of Africa, during her stay and trade there, and from thence to all or any of the West India islands.

   The declaration stated the loss to be by fire in order to prevent the vessel and her cargo from falling into the hands of the king's enemies.

   The *Reliance* sailed May 4, 1804, and arrived on the coast of Africa about the middle of June; on the 24th of that month, being then in the river Gambia, she was chased by a French privateer of greatly superior strength. The *Reliance* endeavored to escape, but finding the privateer rapidly gained upon her, the captain and crew discharged her guns down her hatchway, and having set her on fire in several places, rowed ashore in the long boat.

   The facts were not disputed on the trial, the only question being whether this was a loss by fire within the perils insured against. Lord Ellenborough said: "The case is new; but I "am clearly of opinion that the plaintiff is en- "titled to recover. Fire is expressly mentioned "in the policy as one of the perils against which "the underwriters undertake to indemnify the "assured, and if it is destroyed by fire, it is of "no consequence whether this is occasioned by "a common accident or by lightning, or by an "act done in duty to the State. Nor can it "make any difference whether the ship thus "destroyed by third persons, subjects of the "king, or by the captain and crew acting with

" loyalty and good faith—fire is still the *causa* " *causans*, and the loss is covered by the " policy."

The above is the whole report of the case, from which it appears that the party insured was the captain, by whom the fire was caused and the vessel was burned, and the court held the loss within the perils covered by the policy.

Now, if that fire was not caused by the Privateer, was not in a legal sense the direct act of the Privateer, then it was the voluntary act of the owner, and he could not recover. But being within legal purview the act of the enemy, and *the policy containing no proviso excepting such risks*, plaintiff had judgment.

The case of *Butler* v. *Wildman*, 3 *B.* & *Ald.*, 398, 5 *E. C. L. R.*, 324, decided in 1820, furnished as strong, or a stronger illustration of the principle referred to.

The marginal note is: " The captain of a " Spanish ship, in order to prevent a quantity " of dollars from falling into the hands of the " enemy, by whom he was about to be attacked, " threw the same into the sea, and was im- " mediately afterwards captured. *Held* in an " action upon a policy of insurance upon " Spanish property, subscribed by British " underwriters, who, at the time of effecting " the policy, knew that the assured were " Spanish, and that Spain was at war with the " State to which the capturing vessel belonged; " that this was a loss by jettison, that term, in " a policy of insurance, meaning any throwing " overboard of the cargo, for a justifiable cause. " Secondly, *that it was a loss by enemies*; and " thirdly, if not by jettison, in the strictest " sense, that it was something of the same kind,

" and therefore came within the words ' all
" ' other losses and misfortunes.'"

The declaration stated the loss thus: "That
" while the ship was in the course of her
" voyage, an armed vessel, proceeding from and
" manned with part of the crew of a ship of war,
" carrying a *letter of marque* from and acting
" under the authority of the persons so exercis-
" ing the power of governments in the parts of
" South America aforesaid, made up to the said
" ship in the said policy mentioned, for the
" purpose of attacking the same, and afterwards
" did attack and capture the said ship, whereby
" the said ship became wholly lost to the pro-
" prietor thereof; and that just before the
" armed vessel did attack and capture, and
" while she was preparing to attack the said
" ship in the policy mentioned, the said Jose
" Lopez, the commander thereof, in order to
" prevent the dollars from falling into the hands
" of the persons so on board the said armed
" vessel, and so acting under the authority of
" the persons so exercising the powers of
" government in the said parts of South
" America, aforesaid, then and there cast and
" threw into the sea a certain large quantity, to
" wit, 100,000, of the said dollars, in the said
" policy of insurance mentioned, whereby the
" same became wholly lost to the proprietor
" thereof."

The declaration was demurred to, and the hearing was had upon the demurrer, and it was held that the loss was covered by the policy.

Holroyd, J., said: "It seems to me, *that it is*
" *a loss by enemies, for the meditated attack was*
" *the direct cause of the loss.* Suppose that the

" cargo, instead of being dollars, had been gun-
" powder or other ammunition—one that instead
" of being thrown overboard, a part had been
" consumed in resisting the attack of the enemy,
" that would clearly be a loss by enemies ; and
" I cannot distinguish that case from this."

In *Barton* v. *Home Insurance Company*, 42 *Mo.*, 156, the action was brought for loss from a fire which originated in the same place, Glasgow, while the Rebels were in possession ; but the evidence failed to show whether the fire was caused by the direct act of the soldiers or by their carelessness. The proviso for excepted risks in the policy was the same, or similar, to that in this case. The court say : " The ex-
" traordinary hazard arising from insurrection,
" invasion, military and usurped power, where
" the arm of the civil magistrate is powerless,
" are expressly guarded against and excluded.
" It would be doing violence to the language
" which the parties have seen fit to use, and
" would be also a strained and unnatural in-
" terpretation of their meaning to say that the
" insurer would be liable in all cases, except
" where he could show the burning took place
" by order of the officer immediately command-
" ing the rebellious forces * * * * * *
" If the invasion was the means that occasioned
" or the proximate cause of the loss, then the
" company cannot be held liable within the
" terms of its contract."

In *Powell* v. *Hyde*, 5 *El. & Bl.*, 607, the insurance was on ship *Bedlington*, a British ship from Galatz to London—" warranted free from
" particular average, unless stranded, sunk or
" burnt—also from capture and seizure, and the
" consequence of any attempt thereof." In her

passage down the Danube she passed within shot of a Russian fort. War was pending between Russia and Turkey, but none between the former and Great Britain. The fort fired into the ship and sunk her—alleging that she was mistaken for a Turk—but that the object was merely to detain her; *held*, that but for the warranty the insurers would be liable—but that the warranty protected them.

Lord CAMPBELL, Ch. J., remarked: "I am "of opinion that 'capture' in the warranty, is "not confined to lawful capture; but includes "any capture in consequence whereof the ship "is lost to the insured. The underwriters here, "seeing what perils were likely to accrue in the "Danube, took care to protect themselves."

In *Marcy* v. *Merchants' Mutual Ins. Co.*, 19 La. An., 388, insurance was on a ship "warranted "free from all claim of loss or damage arising "from foreign powers or of *our government with* "*others.*" A fleet of U. S. vessels of war, during the rebellion, had passed the fort below and was advancing up the river; the purpose of the Confederate officers, then about to evacuate the city, was to destroy all the cotton in New Orleans, whether in cotton presses or on shipboard, and she was burned by order of the Confederate authorities. *Held*, that the destrution resulted from and grew out of the collision between the United States, and the Confederate power, then in arms against the authority of the United States, and was a loss not insured against.

2. In disregarding the force of these authorities, the court below invokes the case of *Insurance Company* v. *Tweed*, 7 Wallace, 52, as authority for saying that a new force or power intervened

other than the acts of the Rebels and the fire, and concludes that those acts are the remote cause of the loss, and adds "that such remote cause would not have produced the fire at all." We answer:

1. There is no fact found to support such a theory.

2. It is a well-known military practice to destroy such of an enemy's property as cannot be held. And as these Rebels were invading a loyal State, the chances were against their holding the place; hence, its destruction was probable. The case of Barton *v.* The Home Ins. Co. *supra*, shows that a part, at least, of this very town was destroyed by the Rebels after its capture.

3. But we submit that all this is speculative, and the real question is, whether or not, upon authority and principle, this attack of the rebels was not the direct cause of this fire.

4. So far from the case in 7 Wallace being authority to support the theory of the court below, we say that the court there held that the explosion in a building not connected directly with the one covered by the policy, was the proximate cause of the loss, although the fire which supervened was alone the agent which destroyed the insured building. And, singularly enough, in illustrating the principle, the court supposes a case analogous to that at bar, and says: "Could it be necessary "to exemption that persons engaged in riot or "invasion must have actually placed the "torch to the building insured, and that in "such case if half the town had burned down

" the company would have been liable for all " the buildings insured except the one first " fired."

5. Finally, as well might it have been said in Gordon *v.* Remington, *supra*, that the ship *Reliance* would not have been burned by the enemy if she had been captured; or, in Butler *v.* Wildman *supra*, that the dollars would not have been thrown into the sea if they had been captured by the enemy. In the former case the court says "*it was a loss by enemies*;" and in the latter, " It was a loss by enemies, " for the *meditated attack was the direct cause* " *of the loss.*" The answer appears to be complete.

3. The French decisions appear to be in accord with the principles sanctioned by the above cases. *Vide* note to case of Gordon *v.* Remmington, 1 Camp, 124.

4. It is respectfully submitted that the fire took place by means of this invasion of the rebel military power, as though their shells or troops had lighted it.

Sixth Point.—Again, the suggestion in the court below (p. 18) that this burning was not the result of any agency or act of the Rebels; was not an act of resistance of an attack upon the city; was, in fact, opposed to the object of the attack, and though in a sense caused by means of the attack, there was interposed between the fire and the attack another actor, we submit, with all due respect, is not sound.

1. Manifestly, one of the principal objects of the military, or usurping, or invading power of the Rebels was to capture these very military stores. Was it no act of defense or resistance to prevent the accomplishment of that object? And it is conceded that the fire was the only means available.

2. The objects of the invading forces in effecting the capture of the stores, were not only to increase their own usurping power, but also by that much to lessen the power of resistance on the part of our Government; and the destruction of the stores successfully defended against and defeated the accomplishment of those objects.

3. Then, suppose in making this defense, a shot from the Government batteries had accidentally ignited the stores, could there be a doubt that the fire was caused by the invading attack? Or could it reasonably be urged that the shot was fired by the Government in the exercise of any right or eminent domain?

4. The object in voluntarily firing the stores being the same as in discharging the batteries—that is, to defeat the invasion as far as possible, how can the one be less the act of or caused by the Rebels than the other?

5. Admitted, as it is, that the buring of the stores was done in consequence of the attack, how, in principle is the question affected by the means used? Whether by a rebel shell, a rebel hand, or a loyal hand raised to defeat a successful invasion?

6. It being manifest that the objects of the Rebels were either to possess the military stores for their own use, or to prevent their use by the Government forces; and the tenure of the Rebels of the place in the midst of a loyal State being at best uncertain, it is submitted that the assumption of the court below that the fire would not have happened at all if the Rebels had captures the supplies, is unwarranted.

7. Reasoning on that subject is speculative. The question is, what caused the fire, in the legal sense of the term?

It is submitted that the cases cited furnish the answer, and dispose of this argument.

Seventh Point.—It is gathered from the opinion of the court below, that if the language of this proviso had been now for the first time empioyed in a policy of insurance, there would be much plausibility in our argument that we intended by the contract not only to exclude liability for the consequences of an insurrection, invasion, or rebellion, but for the possible consequences of those violent and forcible means necessary to repel or suppress it. But that as the terms "military or usurped power" were inserted in policies as early as 1720, when the expressions, invasion, military or usurped power had a significance relating to the early English foreign and internal wars, therefore, our terms cannot now be interpreted according to their present popular and plain signification.

1. It may be conceded that there is no difference affecting the principles involved in the discus-

sion, between the invasion or military or usurped power commenced under James the Second, and continued by James Francis Edward, otherwise known as The Chevalier de St. George, long before the language was inserted in the English policies, and continued under Charles Edward, otherwise known as the Young Pretender, and the insurrections, invasions, military or usurped powers connected with our rebellion.

2. But the language of the provisos materially differs. In the old English policies it was: "No "loss or damage by fire happening by any in- "vasion, foreign enemy, or any military or "usurped power, whatsoever, will be made "good." While in the policy in question the proviso reads, "This company shall not be "liable to make good any loss or damage by "fire which may happen or take place *by means* "*of* any invasion, *insurrection, riot, or civil com-* "*motion,* or any military or usurped power."

3. At the very threshhold of the argument it cannot fail to be noticed that in one case the loss or damage must happen *by*, be caused *by* the "invasion," &c.; while in the other, the loss or damage "may happen or take place "*by means of*" the excepted risks; that is, may be brought about in consequence of the "invasion," &c., whether directly or indirectly caused by it.

4. It seems but a fair criticism of the suggestion in the opinion of the court below, to say that the familiar presumption that the law is known to all persons is sufficiently violent, without supplementing it with an assumption that every contractor knows the history of the ancient use of common words as employed in agreements.

5. It is not claimed that the precise import and legal effect of the word "military" has been decided in this connection, yet it is insisted that by being coupled, in a general proviso, with terms which imply a foreign unlawful force, hostile to the existing government, the word "military," which has a well known meaning, shall be limited in signification, as if it had the word "foreign" or "invading" prefixed to it.

6. But the words "*foreign enemy*" are not in our proviso, and other words, significant of the interpretation we claim, are in our proviso. So that the reasoning based upon the maxim of *noscitur a socius*, has a new application.

7. The mere coincidence of the use in our policy of some of the common words employed in the early English policies, in view of the additional fact that we exclude others which may have at that time given peculiar significance by their connection, and that we use other words not found in those early policies, and which destroy the former association, should not be allowed to control in the interpretation of the proviso.

8. The definition of "military or usurped power," incidentally given by Lord Mansfield in Langdale *v.* Mason *supra*, does not exclude the theory, that if loyal troops had, in the case referred to, directly caused the destruction of the property, as they did in the case at bar, it would have been held to be in effect caused by the attacking power. And if the words in the ancient proviso had been "*by means of*," instead of "BY" "military or usurped power," such an exclusion would have been more improbable.

9. The words used in the proviso seem, in their

signification, to be clear to the apprehension of practical men; not obscure, equivocal, nor incomplete. They should be interpreted according to their plain meaning.

Partridge *v.* Insurance Company, 15 Wall, at 579.

Insurance Company *v.* Seaver, 19 Wall., 531.

Eighth Point.—But it is urged, conceding that the attack of the Rebels was the primary cause of the fire, that there was here an intervening, distinct, affirmative power, which was the efficient and actual means by which the fire happened, namely, the lawful act of the United States Government, in setting fire to the stores and building containing them.

We think this view is not tenable.

1. Mr. Phillips, speaking of certain cases in which insurance companies have been holden liable for losses sustained by buildings greatly exposed to be burned, being blown up by gunpowder to stop or prevent the spread of the conflagration, and also of the case of Gordon *v.* Remmington, cited *supra*, says: "The maxim "*causa proxima spectatur*, affords no help in "these cases, but is in fact fallacious, for if two "causes conspire, and one must be chosen, the "more scientific seems to be, whether one is "not the efficient cause, and the other 'merely "instrumental or merely incidental, and not "which is nearest in place or time to the con-"summation of the catastrophe."

Vide Phil. on Ins., vol. 1, p. 633, § 1097, 5th ed., and again at p. 677, § 1132.

"The common place maxim, that in cases of "doubt to which of two or more perils a loss "is to be assigned, *causa proxima non remota* "*spectatur*, has been not unfrequently resorted "to, by which was meant, originally at least, "that a loss is to be attributed to the peril in "activity at the time of the ultimate catas- "trophe, when the loss is consummated. But "much of the jurisprudence is contradictory to "the maxim taken in this sense, and it seems "to have served rather to divert attention from "the proper inquiry, and to becloud instead of "elucidating the subject." And adds: "I un- "derstand the result of the jurisprudence to be "that '*In case of the concurrence of different* "*causes, to one of which it is necessary to attribute* "*the loss, it is to be attributed to the efficient pre-* "*dominating peril, whether it is or not in activity* "*at the consummation of the disaster.*'"

Vide also sec. 1137.

In Brady v. *The Northwestern Ins. Co.*, 11 Mich., 425, Martin, Ch. J., says on page 445: "Much is said by judges of the proximate and "remote cause of the loss; and the distinction "was very elaborately discussed by counsel in "the present case. But, after careful consider- "ation, I must confess that, to my mind, the "word *proximate* is unfortunately used, and "serves only to mislead the inquirer, and to "produce misapprehension of the real rule of "law. That which is the *actual* cause of the "loss, whether operating directly, or by putting "intervening agencies—the operation of which "could not be reasonably avoided—in motion, "by which the loss is produced, is the cause to "which such loss should be attributed."

In Insurance Company v. *Transportation Company*, 12 Wall, at 199, this court recognizes the

distinction which runs through the cases. The insurance was upon a steamer against loss by fire, and the policy did not except loss by collision. A collision occurred which resulted in a fire. The court say: "And certainly that cause "which set the other in motion, and gave to it "its efficiency for harm at the time of the dis- "aster, must rank as predominant," and that it "was true that the collision caused the fire," but that the insurers were not relieved from responsibility because that cause was not excepted in their contract.

In St. John v. *American Mutual Ins. Co.*, I Kern (N. Y.), 519, the insurance was against fire; but the policy exempted the company from "any loss occasioned by the explosion of a steam boiler." An explosion occurred, and caused a fire which destroyed the property. The court held that the underwriters were not liable.

See also *Coolidge* v. *The U. S. Firemen's Ins. Co.*, 14 Johns (N. Y.), p. 308, and cases cited under first point.

And see cases of *Potter* v. *Ocean Insurance Co.*, 3 *Summer*, 27, *cited at p.* 676, of 1 *Phil. Ins.*, with remark of the author upon it; also the case of *Thompson* v. *Hopper*, 38 *Eng. Law & Eq. R.*, 39, *and authorities cited* under it.

Johnson v. *West, of Scotland Ins. Co.*, in 7. Cases in the Court of Sessions (1st series), p. 52.

City Fire Ins. Co. v. *Corlies*, 21 *Wend.*, 367.

Savage v. *Corn Exchange Ins. Co.*, 4 *Bosw.*, 1.

Tilton v. *Hamilton Ins. Co.*, 1 *Bosw.*, 367.

Montoza v. *London Assurance Co.*, 6 *Exch.*, 451.

Lewis v. *Springfield Ins. Co.*, 10 *Grat*, 159.

Hahn v. *Corbett*, 2 *Bing.*, 205.
Brown v. *The St. Nicholas Ins. Co.*, 2 *J. & Sp.* (34 *Supr. Ct.*), 231 & 234.
Peters v. *Warren Ins. Co.*, 14 *Pet.*, 99, 2 *Marsh on Ins.*, 422.
Strong v. *Sun Ins. Co.*, 31 *N. Y. R.*, 103.
Insurance Co. v. *Transportation Co.*, 12 *Wall.*, 199.
Brady v. *Northwestern Ins. Co.*, 11 *Mich.*, 425.
Mathews v. *Howard Ins. Co.*, 1 *Kern.*, 9.
Insurance Co. v. *Seaver*, 19 *Wall.*, 531.
The case *of Insurance Co.* v. *Tweed*, 7 *Wall.*, 44, appears to be quite parallel in principle, and to dispose of the question.

In that case the property insured was cotton in a warehouse. The excepted risk proviso in the policy was similar to that in the case at bar, including, however, risks by "explosion."

An explosion took place in another warehouse situated across the street; it threw down the walls, scattered combustible materials in the street, and resulted in a conflagration. The fire was not communicated from the premises where the explosion occurred directly to the warehouse where the cotton was stored, but came from a third building, which was itself fired by the one where the explosion occurred. The wind was blowing from this third building to that in which the cotton was stored. *Held*, that the insurers were not liable, the case not being one for the application of the maxim "*causa proxima, non remota spectatur.*"

Ninth Point.—The argument which counsel elaborated in the court below, that the fire was caused by the lawful exercise by the Federal Government of its right of *eminent domain* over the property of its citizens, and the government is bound to make compensation therefor to the citizens, is not sound; and is evidently distrusted by the counsel, or that remedy would have been pursued, instead of this at least doubtful one.

1. It is conceded that the military order for the destruction of property was limited to the *military stores*, which were the property of the government.

2. The burning of the buildings was merely an incident growing out of that act of destruction.

3. The firing of those military stores was as much a blow struck at the enemy as any shot or shell fired in the battle; the design of the burning being manifestly like all acts in warfare, to do the enemy the greatest harm, and prevent his gaining any advantage.

4. Suppose the case of a shell fired from a Federal mortar aimed at the ranks of the enemy, and it explodes on the roof of a building in the town, sets it on fire and destroys it. Is that done by Government in the exercise of the right of eminent domain over private property for public purposes for which compensation to the citizen can be demanded?

5. How do the cases differ in principle?

6. The loss was caused by "means of the invasion, insurrection, military or usurped power" in either case.

7. They constituted the "efficient, predominating peril" or cause, the *sine qua non* in the language of the authorities; and the other, the firing of the military stores, was merely incidental.

Tenth Point.—The suggestion that the burning of the premises in question was promoted by the course of the wind, or the intermediate combustible matter, and that thus there was introduced a new cause or means of loss, was not insisted upon in the court below. It seems to be fully answered by the cases referred to under the eighth point.

Eleventh Point.—The judgment of the court below should be reversed.

GEORGE W. PARSONS AND
R. D. HUBBARD,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

THE ÆTNA INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

WILLIAM C. BOON ET AL.,
DEFENDANTS IN ERROR.

Supplementary Brief for Plaintiff in Error.

First. The contention on the part of defendants in error, that the special findings made and signed by the court below and made part of the record of said court by an order entered in September term of the court, are not regularly and properly before this court, is without merit.

Second. The record before this court shows that no *formal*, general, or special finding was made, signed, and filed by the court below, until those so ordered at September term were signed and filed.

1. It has been repeatedly held by this court that the opinion of the court below does not constitute such formal findings.

Insurance Co. vs. Tweed, 7 Wall., 52.
Dickinson vs. Planters' Bank, 16 Wall., 250.

2. The opinion appears to be the only finding that was filed.—(p. 15, &c.)

3. The court say in the order made in September term, (p. 27,) "the court having filed, announced, and declared the findings of facts upon the evidence, with their conclusions of law thereupon, which findings of facts and conclusions of law *were embodied in the opinion of the court* in writing," * * * "and the defendants herein being desirous of having such findings of fact and conclusions of law stated separately from said opinion, and to prepare and tender its bill of exceptions to said conclusions, but through misapprehension having failed to make application therefor at the said April term," &c.

4. It will be seen that the opinion is not signed by either of the judges before whom the case was tried, and it concludes with a mere announcement of the construction of the court, that plaintiffs are entitled to judgment, but makes no order even for judgment.

5. The recitals on page 18, folio 46, are the work of the clerk, and are simply the *postea*, that cannot by any rule of construction be called the finding contemplated by statute.

In Clement vs. Phœnix Ins. Co., 7 Blatch. C. C., at page 52, it will be seen that the learned judge assumes that a formal finding, either general or special, should be signed and filed, or entered in the minutes of the court.

Third. If no proper formal finding, general or special, was made by the court which tried the cause before those special findings were so made and filed, *nunc pro tunc*, in September term, then the argument on the part of defendant in error here is at an end, and his judgment is without validity or force but for the special findings of which he complains.

Fourth. But if the opinion can be treated as findings, then we have in that the requisite special findings, and those supplied in September may be rejected as surplusage.

1. The opinion covers all the findings of fact and conclusions of law which we care to review under our writ of error.

2. A bill of exceptions in such a case, where no exceptions were taken during the trial, is unnecessary.

Phil. Prac., 2nd ed., p. 149.

St. Louis vs. Ferry Co., 11 Wall., 423.

Fifth. But assuming for the moment that the opinion of the court and the announcement of the result at which it arrived were sufficient to warrant the entry of judgment, then we say that it was entirely within the power and discretion of the court to make the order entered in September term, and to put into more formal shape the findings before filed.

1. It is a power which essentially belongs to every court to regulate its own proceedings, where they are not expressly controlled by statute.

King of Spain vs. Oliver, 2 *Wash. C. C.*, 429.

2. Accordingly it was held in *Turner vs. Yates*, 16 How., 14, that the time within which a bill of exceptions may be drawn up and presented to the court depends upon the rules and practice of the court, and the *judicial discretion of the presiding justice.*

See, also, *Walton vs. United States*, 9 Wheat., 657, and cases there cited.

United States vs. Breitling, 20 How., 252.

3. It will be presumed that this was done in accordance with the rules and practice of the court below.

4. The courts of the United States are not governed or controlled by the practice of the state courts, unless adopted by some law of the United States, or by some rule of the court in pursuance of an act of Congress.

Pomeroy vs. Marin, 2 Paine, 476.

5. Section 34 of the Judiciary Act, (p. 16, Abbot's U. S. Prac.,) prescribes simply that when the Constitution, treaties or statutes of the United States, do not otherwise provide, the laws of the several states shall be regarded as *rules of decision* in trials.

Clark vs. Sohier, 1 Woodf. & M., 366, Abbot's Prac., p. 236, and U. S. vs. Wonson, 1 Gall., 5, show the limitations of the application.

Abbot, *supra*, says: "Two important restrictions upon the application of this statute are to be observed.

"*First. It has no relation to matters of practice and proceeding.* * * * It constitutes a rule of decision, and relates to the ends of justice, not a rule of procedure relating merely to the means of justice."

See, also, *Wayman vs. Southard*, 10 Wheat., 1.

6. In *Bank of United States vs. Mass.*, 6 How, at p. 39, the court say: "Indeed, any amendments permissible under the statute of Jeofails, may be proper at a subsequent term;" and quotes—

2 Tidd's Prac., 917,
2 Arch. Prac., 202, 243,

and adds, "and at times even after a writ of error is brought."

Sixth. Some of the cases referred to by our learned adversary, are cases in which the court below undertook to amend either on *ex-parte* application, after adjournment of the term, or after the writ of error had been served. They have no application here; as this application was made on notice, and on the appearance and full hearing of defendant in error.—(p. 23, fol. 70; p. 26 to 29.)

1. For example, in the case of Müller vs. Ehlers, in 1 Otto, 249, referred to by defendant, a bill of exceptions had been signed and filed after the return day of the writ of error; and it did not appear that it was done either on notice or with the consent or knowledge of the adverse party.

Seventh. It cannot be doubted that the court might, under special circumstances, and in its discretion, and in furtherance of justice, allow an informal proceeding to be amended or an inadvertent omission to be supplied.

1. There is nothing on this record to show that the court below misused or did not fairly exercise that discretion, and for sufficient reasons.

Eighth. The contrary not being shown by the objecting party, the court may assume that the circumstances were special and extraordinary

1. Such, for example, as that the court filed this opinion at the last moment of the term; that defendant's attorney was at that time deceased, and the counsel who tried the cause was absent from the state, or any other equally sufficient circumstances.

Ninth. Counsel for defendant in error by his laches has lost the right to urge this point here.

1. He might promptly have moved for a diminution of the record if he had not acquiesced in the order made in September, 1874, over two and a half years ago.

2. But he has allowed the appeal to mature, and plaintiffs in error at great expense to prepare to dispose of the appeal on its merits, and should not be heard now upon this harsh technicality.

Tenth. The case is one of great and almost public importance. It involves the construction of an important proviso in all policies of fire insurance.

G. W. PARSONS AND
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